

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555 (JMP)

4 - - - - - x

5 In the Matter of:

6 LEHMAN BROTHERS HOLDINGS, INC., et al.,

7 Debtors.

8 - - - - - x

9 CASE NO.: 08-01420 (JMP)(SIPA)

10 In the Matter of:

11 LEHMAN BROTHERS, INC.,

12 Debtor.

13 - - - - - x

14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 November 22, 2013

19 10:06 a.m.

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23 B E F O R E :

24 HON JAMES M. PECK

25 U.S. BANKRUPTCY JUDGE

1 Notice of Status Conference for Pending Claims Related to  
2 Restricted Stock Units and Contingent Stock Awards [ECF No.:  
3 41210]

4  
5 Debtors' One Hundred Seventeenth Omnibus Objection to Claims  
6 [ECF No. 15363]

7  
8 Debtors' One Hundred Seventy-Third Omnibus Objections to  
9 Claims [ECF No. 19399]

10  
11 Motion of Lehman Brothers Holdings Inc. for Extension of the  
12 Period to File Objections to and Requests to Estimate Claims  
13 [ECF No. 40939]

14  
15 Caisse Des Depots Et Consignations' Second Motion for Entry  
16 of An Order to Permit a Late-Filed Proof of Claim [ECF No.  
17 39240]

18  
19 Plan Administrators Objection to Classification of  
20 Securities Law Portion of Claim of Federal National Mortgage  
21 Association [ECF No. 40244]

22  
23 Debtors' Ninety-Seventh Omnibus Objection to Claims  
24 (Insufficient Documentation) [ECF No. 14492]

25

1 Debtors' One Hundred Twenty-Fifth Omnibus Objection to  
2 Claims (Insufficient Documentation) [ECF No. 16079]

3  
4 Debtors' Objection to Proof of Claim No. 66099 Filed by  
5 Syncora Guarantee, Inc. [ECF No. 20087]

6  
7 Two Hundred Ninety-First Omnibus Objection to Claims (No  
8 Liability Derivatives Claims) [ECF No. 27380]

9  
10 Three Hundred Ninetieth Omnibus Objection to Claims (Valued  
11 Derivative Claims) [ECF No. 34044]

12  
13 Three Hundred Ninety-Fourth Omnibus Objection to Claims  
14 (Valued Derivative Claims) [ECF No. 34728]

15  
16 Objection to Claim No. 62723 of Banesco Holdings CA [ECF No.  
17 37327]

18  
19 Plan Administrators' Objection to Proof of Claim No. 33514  
20 Filed by Frank Tolin, Jr. [ECF No. 37839]

21  
22 Four Hundred Eighteenth Omnibus Objection to Claims (No  
23 Liability Claims) [ECF No. 38010]

24  
25

1 Four Hundred Twenty-First Omnibus Objection to Claims (No  
2 Liability Derivatives Claims) [ECF No. 38018]

3  
4 Plan Administrators' Objection to Proof of Claim No. 33605  
5 Filed by Sanford A. and Tina A. Mohr [ECF No. 39348]

6  
7 Four Hundred Thirty-Second Omnibus Objection to Claims (No  
8 Liability Derivative Claims) [ECF No. 39570]

9  
10 Motion of EFETnet B.V. to Authorize Late-Filed Proof of  
11 Claim and/or Permit Amendment of Informal Proof of Claim  
12 Against Lehman Brothers Commodity Services, Inc. [ECF No.  
13 40004]

14  
15 Motion to Classify and Allow the Claim Filed by the Federal  
16 Home Loan Mortgage Corporation (Claim No. 33568) in LBHI  
17 Class 3 [ECF No. 40066]

18  
19 Plan Administrators' Objection to Proof of Claim No. 33325  
20 Filed by Arthur A. Boor and Joan Boor [ECF No. 40292]

21  
22 Four Hundred Fortieth Omnibus Objection to Claims  
23 (Insufficient Documentation Claims) [ECF No. 40472]

24  
25

1 Four Hundred Forty-First Omnibus Objection to Claims (No  
2 Liability Derivatives Claims) [ECF: 40473]

3  
4 Four Hundred Forty-Third Omnibus Objection to Claims (Valued  
5 Claims) [ECF No. 40475]

6  
7 Four Hundred Forty-Fifth Omnibus Objection to Claims (No  
8 Liability Claims) [ECF No. 40479]

9  
10 Trustee's Sixty-First Omnibus Objection to General Creditor  
11 Claims (No Liability Claims) [LBI ECF No. 6130]

12  
13 Trustee's Sixty-Second Omnibus Objection to General Creditor  
14 Claims (No Liability Claims) [LBI ECF No. 6131]

15  
16 Trustee's Sixty-Sixth Omnibus Objection to General Creditor  
17 Claims (No Liability Claims) [LBI ECF No. 6157]

18  
19 Trustee's Seventy-Sixth Omnibus Objection to General  
20 Creditor Claims (No Liability Claims) [LBI ECF No. 6295]

21  
22 Trustee's Eightieth Omnibus Objection to General Creditor  
23 Claims (No Liability Claims) [LBI ECF No. 6341]

24  
25

1 Trustee's Eighty-Eighth Omnibus Objection to General  
2 Creditor Claims (No Liability Claims) [LBI ECF No. 6566]  
3  
4 Trustee's Ninety-Fifth Omnibus Objection to General Creditor  
5 Claims (No Liability Claims) [LBI ECF No. 6682]  
6  
7 Trustee's Ninety-Seventh Omnibus Objection to General  
8 Creditor Claims (No Liability Claims) [LBI ECF No. 6684]  
9  
10 Trustee's Ninety-Eighth Omnibus Objection to General  
11 Creditor Claims (No Liability Claims) [LBI ECF No. 6699]  
12  
13 Trustee's One Hundred Sixth Omnibus Objection to General  
14 Creditor Claims (No Liability Claims) [LBI ECF No. 6811]  
15  
16 Trustee's One Hundred Twelfth Omnibus Objection to General  
17 Creditor Claims (Subordinated Claims) [LBI ECF No. 6847]  
18  
19 Trustee's One Hundred Thirteenth Omnibus Objection to  
20 General Creditor Claims (Subordinated Claims) [LBI ECF No.  
21 6865]  
22  
23 Trustee's One Hundred Fourteenth Omnibus Objection to  
24 General Creditor Claims (Subordinated Claims) [LBI ECF No.  
25 6866]

1 Trustee's One Hundred Eighteenth Omnibus Objection to  
2 General Creditor Claims (No Liability Claims) [LBI ECF No.  
3 6906]

4  
5 Trustee's One Hundred Twentieth Omnibus Objection to General  
6 Creditor Claims (No Liability Claims) [LBI ECF No. 6918]

7  
8 Trustee's One Hundred Twenty-Fourth Omnibus Objection to  
9 General Creditor Claims (No Liability Claims) [LBI ECF No.  
10 7008]

11  
12 Trustee's Objection to the General Creditor Claim of  
13 Lawrence Fogarazzo, et al. [LBI ECF No. 7078]

14  
15 Trustee's One Hundred Thirty-Fifth Omnibus Objection to  
16 General Creditor Claims (No Liability Claims) [LBI ECF No.  
17 7185]

18  
19 Trustee's One Hundred Thirty-Eighth Omnibus Objection to  
20 General Creditor Claims (Subordinated Claims) [LBI ECF No.  
21 7264]

22  
23 Trustee's One Hundred Thirty-Ninth Omnibus Objection to  
24 General Creditor Claims (No Liability Claims) [LBI ECF No.  
25 7279]

1 Trustee's One Hundred Forty-Second Omnibus Objection to  
2 General Creditor Claims (No Liability Claims) [LBI ECF No.  
3 7335]  
4

5 Trustee's One Hundred Forty-Third Omnibus Objection to  
6 General Creditor Claims (Non-LBI Employee Claims) [LBI ECF  
7 No. 7336]  
8

9 Trustee's One Hundred Forty-Sixth Omnibus Objection to  
10 General Creditor Claims (Insufficient Documentation Claims)  
11 [LBI ECF No. 7382]  
12

13 Trustee's One Hundred Forty-Seventh Omnibus Objection to  
14 General Creditor Claims (Subordinated Claims) [LBI ECF No.  
15 7388]  
16

17 Trustee's One Hundred Forty-Eight Omnibus Objection to  
18 General Creditor Claims (No Liability Claims) [LBI ECF No.  
19 7399]  
20

21 Trustee's Motion for an Order (1) Confirming the Trustee's  
22 Denial of SIPA Customer Status to Claren Road Credit Master  
23 Fund, Ltd. and (2) Subordinating the Claim [LBI ECF No.  
24 7539]  
25

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Be seated, please.

3 MR. HORWITZ: Good morning, Your Honor. Maurice  
4 Horwitz from Weil, Gotshal & Manges on behalf of Lehman  
5 Brothers Holdings, Inc. as plan administrator.

6 The first item on today's agenda is a status  
7 conference relating to certain pending claims related to  
8 restricted stock units and contingent stock awards.

9 For that matter I'll turn the podium over to Ralph  
10 Miller.

11 THE COURT: Mr. Miller, good morning.

12 MR. MILLER: Good morning, Your Honor. Ralph  
13 Miller from Weil, Gotshal & Manges here on behalf of Lehman  
14 Brothers Holdings, Inc. which I will call LBHI or the plan  
15 administrator.

16 THE COURT: Okay. There are a number of attorneys  
17 assembling as you're speaking.

18 MR. MILLER: Yes, Your Honor. With me are Denise  
19 Alvarez and Theresa Brady and we -- I guess you might like  
20 to take appearances or know who is here from the other  
21 firms.

22 THE COURT: I'll take appearances. I'm also going  
23 to ask for appearances for those attorneys or individuals  
24 who are on the telephone and appearing telephonically at  
25 this status conference.

1                   So let's start with the people who are in the  
2                   room.

3                   MR. SCHAGER: Good morning, Your Honor. It's  
4                   Richard Schager for claimants under the RSU and CSA dispute.  
5                   I'm here with Lisa Solomon and Gene Kaplan from Kaplan  
6                   Landau, and also behind the main bench are Bob Michaelson  
7                   from Rich Michaelson Magaliff and my associate, Andrew  
8                   Goldenberg. There are a couple of pro se's here also, Your  
9                   Honor, whom I will not introduce.

10                  THE COURT: Okay. I think we should have  
11                  everybody identify themselves before we get started. Those  
12                  people who are pro se's and in the room should just give me  
13                  your name, and those who are pro se's who are represented on  
14                  the telephone should do the same, but after we finish in the  
15                  courtroom.

16                  So --

17                  MR. SCHAGER: And my apology -- I'm sorry. My  
18                  apologies, Your Honor. There are two other lawyers here  
19                  representing claimants. Steve Abramowitz from Vinson &  
20                  Elkins and Will Knox from -- I'm sorry. I've forgotten his  
21                  firm.

22                  MR. KNOX: Paduano & Weintraub.

23                  MR. SCHAGER: Sorry. Paduano & Weintraub.

24                  THE COURT: Okay. And apparently not everybody is  
25                  choosing to be up in the soft seats for some reason, but

1 everybody's free to sit down.

2 Do you want to enter your appearances?

3 MR. KENNY: Arthur Kenny. I'm a pro se claimant.

4 MS. HOU: Andrea Hou (ph). I'm a pro se claimant.

5 THE COURT: Okay. Now those who are appearing by  
6 telephone. Is there anyone appearing by --

7 MR. JACOBSON: Lars Jacobson, pro se claimant.

8 MS. BOGERT: Lisa Bogert (ph), pro se claimant.

9 MR. CARRAGHER: Dan Carragher from Day Pitney  
10 representing Fabio Liotti.

11 THE COURT: Okay. I -- I think that's everybody.

12 MR. COHEN: Darian Cohen, pro se claimant.

13 THE COURT: It's not everybody. Now we have  
14 everybody?

15 THE CLERK: Mr. (indiscernible).

16 MR. O'BRIEN: Your Honor --

17 THE COURT: One more in the courtroom.

18 MR. O'BRIEN: Barry O'Brien, pro se claimant.

19 THE COURT: Okay.

20 I think we've now heard from everybody.

21 Mr. Miller, I just wanted to have a record of who  
22 was participating in this status conference.

23 MR. MILLER: Yes, Your Honor. And the  
24 introductions illustrate the first issue I wanted to discuss  
25 with the Court, which is that this started with a large

1 number of claimants in various different categories, and has  
2 now been narrowed down to a very focused group. And I  
3 wanted to briefly report to the Court on the progress that  
4 has been made, where we are and what we believe are the  
5 three issues necessary for the Court to help us with an  
6 order to get a fair and prompt resolution of what is left.

7 If I might, first, as the Court recalls, there are  
8 -- were originally about 3,680 of these claims that related  
9 to restricted stock units, which we call RSUs or conditioned  
10 stock awards. They're called CSAs. They're very much the  
11 same thing except the CSAs were international.

12 About 3,400 of those have been reclassified as  
13 equity because of no objection. About 236 remained after  
14 the reclassification process. The Court set up a procedure  
15 by which certain of the claimants could elect to participate  
16 in discovery. About 100 chose to do so. We call those  
17 participants because they did participate in the year-long  
18 discovery process we've had. Most participants had counsel,  
19 but some were pro se. About another 130 or so did not  
20 participate in discovery. The vast majority of those are  
21 pro se, but some of those have counsel.

22 So we have categories of both participants who  
23 have counsel and are pro se and pro se parties who did not  
24 participate and parties with counsel who did not  
25 participate.



1 LBHI has been working diligently with the  
2 represented participants to build an evidentiary record as  
3 the Court asked us to. More than 30,000 pages of documents  
4 were produced. A download cite was created, system was set  
5 up. The represented participants wanted to try to negotiate  
6 a stipulation. The Court saw some correspondence about  
7 that. Between June and October we devoted substantial  
8 effort to that and came up with a 20 page stipulation of  
9 facts with 20 exhibits, which the Court has approved.

10 There was a day-long deposition taken under Rule  
11 30(b)(6) of a witness from LBHI dealing mostly with  
12 accounting, tax and other technical issues having to do with  
13 RSUs and CSAs. There have been discussions about hearing  
14 procedures. Those have evolved some because we had hoped  
15 that the stipulations and other developments would narrow  
16 the issues, and I believe they have.

17 There have also been some tentative settlements  
18 reached with a very narrow class of these claimants. That  
19 will not substantially affect the procedure going forward.  
20 But we don't believe there are further settlement prospects  
21 on the horizon for a little over 200 claimants that remain,  
22 and it's going to be necessary for us to agree to disagree  
23 and let the Court guide us on the reclassification issue.

24 There are three main open issues for a hearing,  
25 Your Honor.

1 First, there is the question of whether some  
2 claimants should be excluded from the first hearing and  
3 there should be some sort of a secondary procedure where  
4 other claimants who were not in the first hearing would come  
5 forward.

6 This issue is the most significant and it impacts  
7 the other two. It's the position of LBHI that we ought to  
8 have one hearing; that throughout this process, as I will  
9 explain, the pro se parties have been given full opportunity  
10 to either elect to participate in discovery or to get the  
11 benefits of that discovery and they're going to have an  
12 opportunity to brief, to appear and to do other things. And  
13 for administration purposes, it's really important to get  
14 this all resolved at once instead of have it continue to  
15 string on indefinitely.

16 That leads into the second issue, Your Honor,  
17 which is when there might be a hearing set;

18 And the third issue, which is far less important,  
19 is a disagreement over the time and sequence for oral  
20 arguments during the hearing, an issue that I think the  
21 Court might well defer until a little closer to the hearing.

22 I would like to briefly talk about these three  
23 issues.

24 With regard to participation, LBHI has made every  
25 effort to invite pro se claimants as well as represented

1 claimants to either join in the discovery process, if they  
2 wish to participate, or if they wish to sit out and receive  
3 the benefit to have an opportunity to present their case at  
4 the hearing.

5 Our proposed hearing protocol would allow briefing  
6 in which the parties with lawyers, the represented  
7 participants, would file their briefs first. There would be  
8 a delay. Pro se claimants who wish to join in some of those  
9 or want to add special facts would have an opportunity to do  
10 that. LBHI would respond. The briefing would eventually  
11 have the input from everyone.

12 At the hearing we have proposed that although the  
13 represented participants who have the best understanding of  
14 the evidentiary record would put on their case initially  
15 after the opening by LBHI and the framing of the objections.  
16 The pro se claimants who wish to would have an opportunity  
17 to participate. At the conclusion we believe there would be  
18 a complete record and the Court would be able to make a  
19 decision on the reclassification issue.

20 We recognize that a somewhat different procedure  
21 arguably was followed in the case known as the TBD case  
22 which was an LBI proceeding and I believe Mr. Schager may  
23 try to address that.

24 We believe that's distinguishable, Your Honor.  
25 We've set out in a letter to the Court some of the

1 distinctions. But, briefly, those were pre-selected cases.  
2 They were matters where there was not a full evidentiary  
3 record and the hearing was not open to all parties to  
4 participate. In that case, the Court allowed subsequent  
5 submissions. I understand there actually weren't any, but  
6 from parties who wanted to add something to the record.

7 We don't believe that that procedure fits the  
8 facts and circumstances here because we do have a full  
9 evidentiary record, as the Court asked us to develop it, and  
10 everyone has had an opportunity to participate. We believe  
11 that we can effectively do the hearing.

12 The claimants had indicated they would like two  
13 days. We hope it can be done more quickly than that, but  
14 certainly if two days are allowed, there ought to be ample  
15 time with the Court's management and guidance to get  
16 whatever input you want from all the participants.

17 If there is one two-day hearing, we believe it is  
18 most efficient for plan administration if that could  
19 possibly be scheduled by no later than early February. I  
20 mean, the Court has two dates in late January and two dates  
21 in early February which are fine with LBHI and we believe  
22 the briefing can be completed before those dates.

23 The represented claimants favor February 25 and  
24 26. Although this may not seem like much time delay, it  
25 does have an impact on the fifth distribution which comes

1 out near the end of March and has to be calculated in the  
2 middle of March, essentially. And if there is a hearing in  
3 early February and the Court takes several weeks to resolve  
4 it, and if the Court should find that some or all of the  
5 remaining claims should be reclassified as equity, there  
6 would then be time for the 14 day appellate time to run.

7 And assuming that some or all of those were not  
8 appealed, there would then be a group of these claims that  
9 would come back as equity and they would free up funds that  
10 are now being held back in reserve that can't be used in the  
11 fifth distribution. There's about a little over \$25 million  
12 of cash. The reserves are much larger because there are  
13 multiple of that that's being held back for the possibility  
14 these are not reclassified.

15 We don't believe that that's practical and so,  
16 essentially, that \$25 million is locked up for at least  
17 another six months till the following distribution, if this  
18 is delayed much beyond early February.

19 So that's why we think that a hearing date is  
20 important in early February, if possible.

21 The third issue is really a question of who opens  
22 and who closes. We don't think there is much doubt about  
23 the fact that LBHI has the prima facie obligation to frame  
24 its objection and should at least open. We recognize that  
25 all parties should put on their evidence. We think that

1 LBHI should also close, but, frankly, the way the Court  
2 would handle closing is something we think the Court could  
3 determine when you've heard the evidence, you've seen how  
4 the hearing has played out and you decide what you want.  
5 I'm sure, based on the Court's experience, you'll give  
6 everybody an opportunity to rebut and have their say and  
7 there will be a full and fair explanation of the arguments  
8 that people want to make.

9 We have submitted a hearing protocol, Your Honor.  
10 We would ask that you make any modifications that you may  
11 feel are appropriate and enter an order that would give us  
12 guidance. We do think that a single hearing is the most  
13 important issue and that there's a practical way to do that.  
14 And we hope that that single hearing can be set no later  
15 than starting on February the 4th.

16 I would be happy to take any questions, Your  
17 Honor. Otherwise that's I think the status as LBHI sees it.

18 THE COURT: Okay. I think it makes sense to  
19 consider question one; in other words, whether there should  
20 be one or two hearings as a threshold item for scheduling  
21 because one hearing on one or two days may be different from  
22 a case management perspective than two hearings on one or  
23 two days.

24 And so I would like to understand a little bit  
25 more about LBHI's position as to why it makes the most sense

1 administratively and is also fair to all the claimants for  
2 this to be a one-day -- or a one-hearing process, however  
3 many days it takes.

4 MR. MILLER: Well, Your Honor, would you like for  
5 me to respond --

6 THE COURT: Yes.

7 MR. MILLER: -- to that question?

8 THE COURT: I would like you to.

9 MR. MILLER: Yes. I would be happy to, Your  
10 Honor.

11 This is actually a relatively simple legal issue  
12 which has to exist in a factual background. We think the  
13 discovery has not shown essentially any differentiation  
14 between the way claimants have been treated as far as the  
15 information they received, the way the RSUs and the CSAs  
16 were presented to them, the way they were accounted for.

17 We think -- and I don't want to argue the issue,  
18 Your Honor, but we think that all the -- all the facts show  
19 that this has always been treated as equity. It was part of  
20 an equity awards program. It was accounted for under the  
21 accounting rules that deal with equity awards. The  
22 recipients actually had rights to vote as equity in certain  
23 circumstances. The value was always keyed to changes in  
24 stock value. We think that's common to all the parties.

25 And under those circumstances, we don't think that

1 there is any need to have individualized proof of what  
2 people thought or were told or believed or wished for  
3 because, frankly, everything was done through plan  
4 documents. And there's quite a lot of tax overlay that  
5 these plans have to be administered uniformly in order to  
6 receive the tax treatment that they receive. And a very  
7 scrupulous effort was made to publish all of the guidance.  
8 There was a committee that helped with this.

9 And we believe that the fact stipulation that has  
10 been entered, which is largely a stipulation on documents,  
11 says this plan was adopted on such and such a day. It says  
12 this, it says that. Here's a true copy. It is essentially  
13 giving the Court a complete evidentiary record and, of  
14 course, it's available to all the parties.

15 Under those circumstances, we think that these  
16 individual claimants have very little differentiation. We  
17 know of essentially known that is going to require them to  
18 put on individualized cases.

19 And we think that it -- it's a difficult issue to  
20 understand, and if you separate it between some people who  
21 hear the entire story and have the sophistication that the  
22 represented claimants do have at this point, who  
23 participated in discovery, if that explanation is not  
24 provided to people in a secondary hearing, there's going to  
25 be a great deal of confusion and great inefficiency.



1           So having everyone together at one time to see the  
2       briefing, to submit the briefing to the Court, and for those  
3       who want to participate pro se, many of whom are not  
4       lawyers, to sit through and understand what the lawyers who  
5       are acting for claimants have presented and to see what  
6       issues the Court is asking, that's going to simplify the  
7       case. And, frankly, it's hard for us to believe that many  
8       pro se claimants are going to have a whole lot that they're  
9       going to be able to add or change or do about that because  
10      we think the issues have been framed fully and completely.

11           If they do, we're happy to have an opportunity to  
12      do that and those can be broken out and can be dealt with.

13           But setting aside a separate hearing day, time and  
14      schedule, essentially from the standpoint of plan  
15      administration, creates a major issue because we then don't  
16      know how those are going to be resolved and we don't know,  
17      and it's not clear if the Court's going to want to rule on  
18      just the issues when it's heard one part of the hearing or  
19      whether the ruling would be deferred until there are two  
20      hearings.

21           But since I suppose somebody might make an  
22      argument different in the second hearing than the first  
23      hearing, there's a real possibility that the major legal  
24      issue would not be resolved. And, of course, the major  
25      legal issue, as you framed it before, is whether the Enron

1 case is going to be followed and whether there's anything  
2 that distinguishes these restricted stock units and  
3 conditional stock awards from the stock options that were at  
4 issue in that case. We believe there's not, but we believe  
5 that really is not a claimant specific issue. We believe  
6 that that's an issue that has to do with the programs.

7 So for --

8 THE COURT: Okay.

9 MR. MILLER: -- those reasons, we think it's one  
10 question. It's one set of facts. The facts vary little  
11 from year to year and so on, but it's essentially one common  
12 story, Your Honor, and we think it makes no sense to cut it  
13 into pieces.

14 And we think the -- frankly, in terms of fairness,  
15 we think the reason that the parties may want to cut it into  
16 pieces is that some believe that they may receive some  
17 advantage by going first and perhaps not having the  
18 distraction or issue of having others with them.

19 We don't think that's going to be the case, by the  
20 way. We think everybody will have a full and fair  
21 opportunity to present their case.

22 We also think from a standpoint of the fairness  
23 sense for the pro se claimants, they ought to feel like  
24 they've had to -- an opportunity to participate in the real  
25 hearing, the big hearing, the first hearing, the whole

1 process. And we're concerned that if you -- if you relegate  
2 them to a secondary process, they may not have the  
3 experience of participating in it.

4 And as Your Honor knows, these are all former  
5 employees of the Lehman Brothers' various entities. Many  
6 were not employees of LBHI because LBHI was the only one  
7 that had the stock. So you couldn't issue LBI stock or LBL  
8 stock or whatever. So LBHI had to have a program. It was  
9 -- it actually sold the stock as the record now shows to  
10 subsidiaries in the form of -- there was actually inter-  
11 company purchase of the RSUs by the subsidiaries.

12 But in any event, there's really no distinction.  
13 It was a unitary program and LBHI would like for its former  
14 employees and for the former employees of its affiliates to  
15 feel that they were treated fairly.

16 THE COURT: Okay.

17 MR. MILLER: Anything else, Your Honor, for LBHI?

18 THE COURT: Well, let me just react to something  
19 that you said.

20 It's my recollection from long ago when we had  
21 hearings on the RSUs and the CSAs and any number of pro se  
22 claimants came forward and spoke to me that each of them had  
23 a slightly different story to tell. And so one of the  
24 fundamental questions I have, because I'm not privy to the  
25 discovery that has taken place and I have not addressed the

1 stipulation of fact so I'm not sure if it's been filed with  
2 the Court or if I've had -- I have access to it. But I can  
3 tell you I haven't read it. So I am at a disadvantage in  
4 knowing what the facts show that the parties have agreed to.

5 But part of your presentation today tells me --  
6 others may disagree with what you've said -- that if you  
7 look at the factual record as it has developed over time, at  
8 least from LBHI's perspective, individual differentiation of  
9 stories, claims, circumstances, whatever that may be has no  
10 bearing on the governing legal question of treatment of  
11 these claims, at least from LBHI's perspective.

12 So several questions:

13 First, does this suggest the possibility of  
14 dispositive motion practice with regard to all of these  
15 claims that would avoid an evidentiary hearing, or because  
16 of the presence of pro se claimants, is that procedure  
17 unworkable? That's question one.

18 And question two, if we were to have a single  
19 evidentiary hearing would it be possible in the estimation  
20 of LBHI to resolve all class claims at once, whether they're  
21 represented or unrepresented, regardless of where the  
22 employees may have been employed simply on the basis of  
23 legal argument, or are there factual distinctions applicable  
24 to individual claimants that would lead to different  
25 outcomes based upon the facts presented for each such

1 claimant?

2 MR. MILLER: Well, Your Honor, I would like to --  
3 might I have a moment to consult with my partner, Ms.  
4 Marcus, and others, particularly on your first question.

5 As far as the second question, which I think I can  
6 -- can address, that requires a digression into one issue  
7 that was very prominent in the hearing that you had which we  
8 believe has been largely resolved by this partial settlement  
9 offer and arrangement that was made.

10 There are some claimants who spent a good deal of  
11 time talking at the first hearing on this about the fact  
12 that in 2008 commissioned salespeople had withholdings from  
13 their pay which -- for which RSUs were never issued. There  
14 was a partial issue of RSUs in 2008. Usually they're issued  
15 at the end of the year, but some were issued during the  
16 year.

17 The settlement that was offered was to that  
18 category of individuals who had withholdings for which RSUs  
19 were not issued. And these settlements are tentative. They  
20 have not been finalized by documents yet. I can tell you  
21 that all of the -- and some of the represented participants  
22 were not in that category. Unless someone was a  
23 commissioned salesperson who worked there in 2008, then they  
24 didn't have any claims in this category.

25 I -- without going into settlement

1 confidentiality, all of the -- all of the represented  
2 claimants that we've heard from and the participants who  
3 were in that category have accepted one of the two  
4 settlement options that we gave. So we think at least that  
5 issue is going to be greatly reduced. We have at least one  
6 that is still unclear as to whether it's going to be  
7 accepted or not. It has counsel. And we have some pro se's  
8 who didn't respond.

9 So that issue is now much less prominent in the  
10 case. There's actually, I think, nine or ten claimants that  
11 may have something on that issue.

12 If that issue remains and needs to be litigated,  
13 it has some individual component to it as we see it, and  
14 that's one of the reasons we made an offer and tried to deal  
15 with that issue as we felt it was a separate question.

16 Outside of that question and having to do with a  
17 -- the people who got RSUs and got CSAs we really don't  
18 think there's any individual distinction. And in terms of  
19 whether you could resolve this, we think that this issue  
20 that deals with sort of the very tail end of the program,  
21 sort of when the music stopped who had a chair, if you will,  
22 in 2008, we think that should be pushed until the rest of  
23 the issues are considered.

24 And we think that they can -- all issues can be  
25 resolved in one hearing, including that issue if it's

1 necessary for the Court to address it at that time, which  
2 LBHI still very much believes it comes -- it follows,  
3 essentially, the resolution of the first one. If the RSUs  
4 and CSAs were always equity, then we think a promise to get  
5 equity in the form of an RSU and CSA is still equity. But,  
6 nonetheless, that has some -- has some distinctions to it.

7 And so to explain the single hearing concept, we  
8 think that there is no doubt that by far the most important  
9 issue and the one that -- that the Court should - that we  
10 need really guidance on is whether the issued RSUs and the  
11 issued CSAs should be reclassified as equity. And we think  
12 that can certainly be resolved in a single hearing and we  
13 think that these other issues ought to be resolved in a  
14 single hearing largely based on what some pro se's we  
15 haven't heard from may say or do. That's a very small  
16 number left in terms of the amounts in controversy at this  
17 point.

18 THE COURT: Sounds like it's one and a half  
19 hearings.

20 MR. MILLER: All right, Your Honor. If that's  
21 helpful in number two.

22 As far as number one, I will say we can always try  
23 motion practice. The issue, of course, is if someone tries  
24 to file a declaration, say they want to create a fact issue,  
25 I mean, we've -- we've spent a lot of time and effort. The

1 Court suggested that you wanted evidence and we've tried to  
2 get evidence. I realize evidence could be presented in this  
3 form through the stipulation and other things. But with the  
4 overlay of the pro se's who it's difficult to know whether  
5 somebody is going to hurl in affidavits or something else  
6 that would make a summary judgment type procedure difficult  
7 to manage.

8 I think -- my personal belief, having spent time  
9 with it, that it's easier to set aside two days and maybe  
10 it's a day and a half, Your Honor -- it's like your hearing  
11 and a half -- and just kind of let everything come in, let  
12 the Court have the full record and see if we can't get this  
13 behind us.

14 But if you want us to do it with motion practice,  
15 obviously we will try to do that, Your Honor.

16 THE COURT: No. No. I'm not -- I'm not promoting  
17 it at all. I'm rather trying to understand what I've heard.  
18 And one of the things that you said was based upon an agreed  
19 factual record and evidence that should not be controversial  
20 because it should all be admissible and could be the subject  
21 of declarations and submissions, that very often is the  
22 basis for a summary judgment motion and argument.

23 But I'm also hearing you say that given the nature  
24 of the dispute and the nature of the claimants and their  
25 composition -- some being represented, some being pro se,



1 some being commissioned salespeople, some working for  
2 different Lehman entities -- that it may be more  
3 administratively convenient, not only for the parties, but  
4 for the Court to have an evidentiary hearing in which all  
5 parties can simply appear and be heard on the basis of some  
6 record that's already admitted. Is that my understanding of  
7 the position?

8 MR. MILLER: Well, Your Honor, we think that  
9 certainly that option should be preserved, and I think you  
10 should hear from some of the claimants' counsel.

11 THE COURT: I --

12 MR. MILLER: One of the things that they have told  
13 us that I'm aware of -- and I don't want to speak for him --  
14 is that some of their clients want to testify live and tell  
15 you their story. And we don't really think -- we didn't  
16 take any depositions. We didn't think any discovery was  
17 necessary. We don't think that's going to change anything.  
18 But if people have a strong urge to do that, you know,  
19 that's a factor.

20 I -- it's always dangerous to suggest a procedure  
21 that has not been fully vetted, but let me propose to the  
22 Court that one option might be that LBHI could certainly  
23 file a motion for summary judgment or, in the alternative, a  
24 trial brief and support it with the record that LBHI thinks  
25 it has, and then everybody could be called upon to try to

1 respond to that and see -- if they think it shouldn't be a  
2 summary judgment, they can say why and if they think it  
3 should be a summary judgment, but it should be decided in  
4 their favor, they can say why. And all that could be  
5 briefed to coincide with the hearing schedule.

6 And if the Court looks at that and decides you've  
7 got a summary judgment, you can cancel the hearing,  
8 obviously as -- hopefully a little bit in advance so that  
9 people won't have to travel and resolve it as a summary  
10 judgment, then at that time you'll know who's responded,  
11 whether you have contested issues of fact, whether the  
12 summary judgment process has been followed as you might set  
13 it up, or you can go ahead and say, okay, we'll go ahead and  
14 have the hearing, or you can have a hearing on whatever is  
15 left.

16 I mean, in that sense you could find out what  
17 could be submitted by motion. I've certainly had trials in  
18 federal district court, for example, where the parties both  
19 file summary judgments and we went to trial and the Court  
20 said, I'm going to consider the summary judgments, and the  
21 Courts granted summary judgments sometimes halfway through  
22 trial.

23 So, I mean, it is possible to have a summary  
24 judgment procedure before the Court and also have a hearing  
25 scheduled.

1 And then one way or the other we're going to be  
2 done. Either the summary judgment works and you get to  
3 resolve it on summary judgment or the hearing is concluded.

4 But, again, I've not had a chance to vet that with  
5 my colleagues or my clients. But if the Court were  
6 interested in that, it seems to me, based on what I know  
7 about the facts in the record, that would be a practical  
8 thing that we could do.

9 THE COURT: Well, what I'm interested in -- and  
10 I'm going to hear from parties who are opposed to the notion  
11 of one hearing in a moment. But what I'm interested in is a  
12 procedure that works for this unique class of claimants and  
13 that also provides a mechanism for orderly disposition of  
14 the legal issues presented. I'm not trying to propose  
15 anything to make it more complicated. Instead, I'm just  
16 asking a question as to whether there's a way to make it  
17 less complicated.

18 And what I think I've heard you say is that  
19 conceivably there could be a summary judgment process here,  
20 but it's one that in all likelihood would prompt objections,  
21 factual assertions not in the stipulation, and requests for  
22 live testimony.

23 If that's all true, even before hearing from  
24 counsel for the claimant group, I see no reason to start a  
25 process that will not produce a ready outcome.

1 I'm simply -- I raised the question in the first  
2 place because you made references to legal issues that would  
3 govern the outcome more or less regardless of particular  
4 facts that might be asserted by individual claimants. In  
5 other word, a governing standard that would apply no matter  
6 what a claimant came in and said. That's what I was  
7 understanding you to be saying.

8 MR. MILLER: Well, Your Honor, I don't believe  
9 that the -- that we think there's any competent way that a  
10 claimant can vary the terms of the plans, all of which said  
11 they couldn't be varied. And so we don't know what the  
12 claimants are going to say.

13 I will stress, Your Honor, LBHI has always thought  
14 this was pretty simple. We think the Enron case controls it  
15 and we think this looks like equity. It was treated as  
16 equity. It functions as equity. It's equity.

17 The claimants have raised -- and this is their job  
18 -- a lot of the issues to try to make that more complicated  
19 and say, maybe it shouldn't be treated as equity, maybe it  
20 should be treated as something else. It's not clear to us,  
21 frankly, what different claimants are going to say it should  
22 be treated as or exactly how they're going to argue this  
23 because we don't have comprehensive briefing after their  
24 evidentiary record from the various represented claimants.  
25 We have nothing from the pro se claimants.

1 THE COURT: I know what they're going to say  
2 because I remember what they said last time. Many of them  
3 are going to say they had no choice in the matter. This was  
4 part of their compensation. It was a given that these RSUs  
5 represented part of what they worked for and their lawyers  
6 argue that it should be treated as employee compensation.

7 I understand what your argument is; that it's just  
8 equity and needs to be treated as equity. But I have a  
9 strong sense that the individuals who experienced what it  
10 was to be an employee of Lehman Brothers prior to the  
11 bankruptcy have a need to be heard, not just a need to  
12 respond to summary judgment papers or to submit letters.  
13 And that part of what this process is about is  
14 reconciliation on a personal level for those employees who  
15 feel that the bankruptcy rendered them victims.

16 I mean, there are plenty of creditor victims  
17 around the world, but the employees in question for the most  
18 part did not participate in any of the decisions of Lehman  
19 Brothers that led to its bankruptcy. In that sense, I  
20 recognize the psychological benefit to them, and perhaps  
21 also the ultimate legal benefit to them in having their day  
22 in court.

23 So I withdraw the reference to summary judgment or  
24 summary disposition. I don't think it's going to work here.  
25 But I'll certainly hear what counsel for the group has to

1 say on the subject and what any individuals wish to add.

2 MR. MILLER: Your Honor, I -- obviously, I don't  
3 want to speak for the claimants, but certainly we have  
4 received a message similar to what you just expressed in our  
5 dealing with them. And, again, LBHI will do this any way  
6 the Court wants us to do it. We are happy to submit a  
7 summary judgment conditionally, but we do believe that going  
8 through say a three or four-month discovery -- a summary  
9 judgment process, if it fails and then trying to get a  
10 hearing set is not in the best interest of plan  
11 administration.

12 A great deal of expense has been devoted by the  
13 estate to building this evidentiary record and to giving the  
14 claimants their day in court and the opportunity to develop  
15 their position. And while we tried to be economical about  
16 that, the fact that there are differing counsel and people  
17 without counsel has made that -- has made that more  
18 challenging.

19 And so the plan administrator would like to go  
20 ahead and sort of stop the bleeding in terms of the expense  
21 and also get resolution because, as Your Honor knows, there  
22 is -- there is an issue about extending the claims deadline.  
23 We're trying to get as many claims processed as fast as we  
24 can. This is a chunk that is not only taking time to get  
25 handled from an accounting standpoint, but it's taking

1 resources from the people who can handle claims calculating  
2 these things. Just a small settlement segment we did took a  
3 lot of calculating resources to try to get that done.

4 So the plan administrator would like to get a --  
5 sort of a surer certain exit path to the discovery, to the  
6 cost, to the process, and we think a hearing is a way to do  
7 that and let people express their views.

8 So we appreciate that, Your Honor.

9 THE COURT: Okay. Let's give those who wish to  
10 speak regarding a one-hearing or two-hearing process and  
11 also my comments regarding summary disposition a chance to  
12 present their positions.

13 MR. SCHAGER: Thank you, Your Honor. Richard  
14 Schager for some of the claimants here who I won't identify,  
15 but I will say there are 48 that my firm represents out of  
16 the total of 78 claimants who are represented by counsel.

17 Your Honor, I appreciate your time today. I think  
18 we can already tell that the time taken today will come back  
19 in terms of a more efficient hearing or procedure that we  
20 follow. So thank you for this.

21 I was going to address the issue of the hearing  
22 day first, Your Honor. One thing on which we agree are the  
23 three issues that were open today. But if Your Honor  
24 prefers, I'll go directly to the issue of the participation  
25 of the pro se's.

1 THE COURT: Well, actually, what I was dealing  
2 with, and it may be that it's the wrong order, but it's the  
3 one that I picked, is whether we're talking about one  
4 hearing or two hearings. And once I know if we're dealing  
5 with one or two, we can then talk about dates.

6 MR. SCHAGER: Very good, Your Honor. And I will  
7 say this; that I think there is one sequence here that is --  
8 will illustrate the issues that we have. I think at the  
9 outset I would say that the lawyers who represent claimants  
10 don't have a personal stake in whether the pro se's  
11 participate in the hearing or not. Some of us feel that it  
12 would be a more efficient hearing without the participation  
13 of the pro se's and others think that the pro se's should  
14 participate. As a group I'm afraid we don't have a  
15 position.

16 I think Your Honor knows from my correspondence  
17 that as one firm representing a certain number of claimants  
18 I have always felt that the hearing would be more  
19 efficiently done with just the represented parties as sort  
20 of a test case, if you would like, and I use that phrase  
21 "test case" advisably. The language that was -- that Mr.  
22 Miller quoted that was our so-called position, Your Honor is  
23 familiar with that language, of course, because we drew it  
24 from -- from your decision. And we thought that was an  
25 approach that the Court may wish to pursue.



1 In addition to that, Your Honor, I think it's fair  
2 to say that there was the representation that we have been  
3 negotiating this order for months. The fact is that we made  
4 a proposal at the end of July and there was no response  
5 until the very end of October. So over three months passed.  
6 There was even an interim memo from me to Lehman's counsel  
7 saying, hey, if you want a distribution in the spring, you  
8 better get on the ball and respond to this, and nothing  
9 happened.

10 So the three months passed and then a proposed  
11 order comes out saying, okay, here you go. Your brief is  
12 due in a week. Now you can smile and say, well, that's how  
13 lawyers deal with each other, but that statement also  
14 applied to the pro se's and that's really why I mention it  
15 now. To come out with an order on October 30 saying, pro  
16 se, your brief is due in a week is not a fair approach.

17 Now what's our concern about that, again, we  
18 obviously don't represent parties appearing pro se. But I  
19 think it's fair to say that we were not prepared to be part  
20 of a stipulated submission to the Court treating the pro  
21 se's this way.

22 So as much as I can say, Your Honor, is that some  
23 of us think the hearing would be run more efficiently  
24 without the participation of the pro se's. It's already  
25 complex by a couple of different groups represented and a

1 couple of different issues presented. And we have someone  
2 ready to speak to that.

3 The second issue, Your Honor, is that with a good  
4 number of pro se's out there saying that they're going to  
5 present their case in two hours, I think, is just not being  
6 fair to them. On that issue, Your Honor, I think I would  
7 defer to a couple of the pro se people who are here today.

8 I hate to beg the question, Your Honor, but we --  
9 yes, we did raise the issue of how the pro se's would  
10 participate in the hearing. We did that largely because of  
11 the way the Court addressed the issue, we believe, in  
12 December of 2011 and we didn't want to be a party to  
13 something that was basically ramming something down the  
14 throats of the pro se's. But we don't represent the pro  
15 se's and we are inclined to let them speak for themselves  
16 and to be guided by the Court's approach.

17 THE COURT: Okay.

18 MR. SCHAGER: Is that a fair statement, Your  
19 Honor?

20 THE COURT: Well, maybe I should -- maybe I should  
21 hear from certain of the pro se's because they're the ones  
22 who are most directly affected by the one hearing versus two  
23 hearing structure that we're discussing.

24 I'm hearing you say that you believe it would be  
25 more efficient for there to be a hearing in which only the

1 represented claimants participate, presumably the pro se's  
2 would be physically present because they would be very  
3 interested in the outcome. And you would then have a  
4 further hearing when they would appear and be heard,  
5 presumably having been educated by sitting through a process  
6 in which counsel has presented evidence and argument.

7 Therefore, from the perspective of the pro se's it  
8 seems to me this is a somewhat either burdensome or  
9 beneficial process depending upon how they view it because  
10 they either get to study in what amounts to the phase one  
11 approach of represented parties, go home, think about what  
12 they've heard and come back having been educated, so some  
13 may say that's a benefit, or some may say why should we be  
14 treated differently. The evidence is being presented at one  
15 time.

16 From the Court's perspective, the Court really  
17 needs to hear all the evidence within this not quite class  
18 action because it's just a bunch of individuals that are not  
19 really represented by counsel, and the finder of fact trying  
20 to deal with what Mr. Miller describes as one governing  
21 legal question presumably has to wait until the last witness  
22 has spoken in the second hearing, thereby burdening  
23 everybody equally.

24 So I think we have an imperfect structure no  
25 matter how this is to be decided. But I would be interested

1 in knowing how the pro se's who wish to be heard on this  
2 issue feel about it because they are the ones most directly  
3 impacted it seems to me.

4 The Court is going to hear it all in any event,  
5 whether it's heard in one or two days as one hearing or  
6 whether it's heard in one, two or four days as part of a  
7 longer bifurcated process. But, in effect, what you're  
8 really talking about, whether it's one hearing or two, is an  
9 order in which the proof and argument is being presented.

10 Effectively, it doesn't matter to me. I'm  
11 indifferent as long as the parties approve the structure and  
12 believe it to be fair because it's the same impact from my  
13 perspective.

14 What do the -- can I hear from some pro se's who  
15 wish to be heard on this? And if nobody has anything to  
16 say, I'll just decide it myself.

17 MR. KENNY: Arthur Kenny, Your Honor.

18 The -- I'm a commissioned salesman so I was kind  
19 of lumped together, you know, with the opening statements  
20 from counsel that you're talking about RSUs and CSAs, and  
21 then under questioning from Your Honor he acquiesced to the  
22 fact that, yes, there was another category, the commissioned  
23 salespeople who had commissions withheld. And so I'm in  
24 that category. And I just want to make sure that there is a  
25 differentiation which wasn't differentiated in the opening

1 statement by counsel this morning.

2 So, you know, I want to make sure that I'm heard.  
3 I want to -- you know, I'm very sensitive to the efficiency  
4 of the Court and while I've attended I've tried to, you  
5 know, be a fly on the wall and observe and learn, yet I  
6 still want to be heard as to the classification that I have  
7 for my particular situation which is similar to those of the  
8 other commissioned salespeople.

9 So, you know --

10 THE COURT: Are your claims part of this  
11 settlement that has been referenced by Mr. Miller?

12 MR. KENNY: I received an offer which was -- you  
13 had to respond --

14 THE COURT: I don't need to know the specifics of  
15 it.

16 MR. KENNY: No. I know the specifics, but there  
17 was a certain date which has expired. So if you didn't  
18 respond then you're -- you're continuing to go along.

19 Now --

20 THE COURT: Does that mean that you've rejected  
21 the proposal or does that mean --

22 MR. KENNY: I've rejected --

23 THE COURT: -- you just haven't gotten around --

24 MR. KENNY: Rejected --

25 THE COURT: -- to thinking about it?

1 MR. KENNY: No. Well, I've rejected the proposal  
2 in the sense that if I didn't respond by a certain time,  
3 then it was rescinded. Okay.

4 THE COURT: Don't you think it might be renewed if  
5 you were interested?

6 MR. KENNY: Well, renewed, you know, I didn't find  
7 it an acceptable settlement.

8 THE COURT: All right. Fine.

9 MR. KENNY: So it -- that was the case.

10 And the situation is that part of the settlements,  
11 there was two parts to a settlement. Without getting into  
12 particulars, but claimants would still go on even if they  
13 accepted the second part of the settlement. So it wasn't  
14 that they were extinguished and went to equity. Okay.  
15 There was a second part which would continue going forward.

16 THE COURT: It sounds to me -- and I don't need to  
17 know the specifics -- that part of the proposal deals with  
18 the withholdings; is that right?

19 MR. KENNY: Yes.

20 THE COURT: Okay.

21 MR. KENNY: Yes. Exactly.

22 THE COURT: So what do you think about one hearing  
23 versus two hearings?

24 MR. KENNY: I -- I honestly don't know. I mean, I  
25 just want to be heard in the efficiency of the Court. I'm

1 --

2 THE COURT: You don't care?

3 MR. KENNY: I really don't care. I want to be  
4 heard, but whether it's one or two, you know, I would, you  
5 know, leave it to the lawyers here who do have  
6 representation of other clients in my category.

7 THE COURT: Right.

8 MR. KENNY: So --

9 THE COURT: Okay. Are there --

10 MR. KENNY: -- they would be better judges.

11 THE COURT: Since you're indifferent --

12 MR. KENNY: No. No disrespect, sir.

13 THE COURT: Okay. Fine. Thank you very much.

14 MR. KENNY: Yes.

15 THE COURT: Since you're indifferent on the point,  
16 are there any pro se's who are present in court who care  
17 about this issue?

18 MS. HOU: Andrea Hou, Your Honor.

19 I guess what's important from a pro se's point of  
20 view is that, you know, we get the benefit of being better  
21 educated and also being heard. Again, it doesn't matter  
22 whether you have two day or four day or one day hearings.  
23 But I think it's important to keep in mind that there are  
24 197 constituents and that these constituents are probably  
25 those with the least resources to help themselves through

1 the process. So we appreciate Your Honor's emphasis on  
2 making sure that, you know, we're educated -- better  
3 educated and heard through the process. That's -- that's, I  
4 guess, what's important.

5 THE COURT: Okay. Are there any pro se's on the  
6 telephone who wish to be heard on the issue?

7 MR. JACOBSON: Yes. Lars Jacobson, Your Honor.

8 You know, my gut feeling -- and my apologies if I  
9 speak freely here, but my gut feeling is I prefer to have a  
10 one-hearing format. My concern is in a bifurcated format is  
11 that we could very well be in a situation where the estate's  
12 counsel uses techniques that -- legal techniques that we're  
13 all unfamiliar with to, you know, muddle up the process, if  
14 you will. That concerns me.

15 Just as an example anecdotally -- well, not  
16 anecdotally, but just an example, I got my settlement offer  
17 Thursday of last week with the deadline being on Monday. I  
18 actually had a child on Tuesday, so it didn't really work.  
19 I had to do a number of different things to take a look at  
20 it, but that is just an example of what I perceive to be,  
21 you know, legal muddling, if you want to call it that.

22 So from my perspective, I would like to just kind  
23 of throw my hat in and say I would like one -- you know, one  
24 hearing, I guess, for everybody.

25 THE COURT: Okay. Anybody else on the telephone?



1 Okay. Here's what I think.

2 I think that it makes sense for there to be one  
3 hearing that is well coordinated. In practice it may turn  
4 out that the one hearing occurs in a Part A and a Part B,  
5 but we're going to have one hearing. Effectively, this  
6 structure is going to be one in which as issues are being  
7 presented by counsel in reference to represented claimants  
8 that touch on the interests of similarly situated pro se  
9 claimants, it would be most sensible for all of those  
10 factual issues to be heard at once rather than in parts.

11 And while I recognize that this imposes something  
12 of a burden on counsel for the represented group, counsel  
13 probably will need to think about how to coordinate  
14 presentations not only for their represented clients, but  
15 also with those pro se's that may be in the same class or  
16 that may have aligned interests so that there can be a  
17 coherent and efficient presentation of the record evidence.

18 So there will be one hearing and I impose what  
19 amounts to an extraordinary burden on all parties, including  
20 those represented and unrepresented, to work together so  
21 that you don't step on each other's toes.

22 Okay. Now we get to scheduling. And I have an  
23 observation that really goes to one of the things mentioned  
24 by Mr. Miller earlier.

25 I think it highly unlikely that a hearing in late

1 January or early February will result in a ruling that  
2 allows for freeing up the \$25 million in reserve. And I  
3 think it is much more realistic to assume that that \$25  
4 million will be held for another six months. And so I don't  
5 believe that should be a factor that plays into scheduling,  
6 particularly since we are having a single hearing that  
7 requires a high degree of planning and coordination.

8 If that helps the parties reach agreement as to  
9 when the hearing should be scheduled, I suggest that the  
10 parties simply agree on that rather than have me decide the  
11 question. It should be a date that realistically accounts  
12 for the time needed to prepare, the time needed to  
13 coordinate, and briefing.

14 MR. KAPLAN: Your Honor, also as I recall when I  
15 spoke to chambers -- Eugene Kaplan. I represent the  
16 Newberger (ph) claimants.

17 When I spoke to chambers when I was given the  
18 dates in late February, there were three days actually  
19 available at that time. So it may be most efficient if Your  
20 Honor does have those three days, since we're now having  
21 this hearing with the pro se's to have the extra day  
22 available in case -- in case we spill over rather than at  
23 some other -- at some other point.

24 They were the -- it was the 24th, 25th and 26th or  
25 the 25th, 26th and 27th, I forget. But it was -- I was told

1 by your clerk that there was -- it was a three-day block  
2 there rather than a two-day block that was available.

3 MR. SCHAFFER: But, Your Honor, if I -- if I may  
4 comment there, my recollection is from Mr. Kaplan's  
5 correspondence that the Court said either the 25th and 26th  
6 of February or the 4th, 5th and 6th of March. It was the --  
7 the three-day block was --

8 MR. KAPLAN: It was in March?

9 MR. SCHAFFER: -- in the first week of March.

10 MR. KAPLAN: It was March?

11 THE COURT: My suggestion is that parties not  
12 fixate on these dates. They were provided by my courtroom  
13 deputy not in consultation with me, and those dates do not  
14 necessarily represent reality in any event.

15 I think the parties should use their best judgment  
16 as to when it would be most convenient for a hearing to be  
17 held, and my courtroom deputy, in cooperation with others in  
18 the court, will endeavor to accommodate those dates.

19 Is there more on scheduling? There was -- I think  
20 what I would like the parties to do is to simply meet and  
21 confer and to develop an agreement.

22 And then what about opening and closing as an  
23 issue? That needs to be resolved now.

24 MR. SCHAFFER: Your Honor, Richard Schaffer  
25 speaking once again.

1 I think some of us, myself included, were  
2 surprised that this was be -- had become such a major issue.

3 MR. SCHAEFFER: Your Honor, Richard Schaeffer  
4 speaking once again. I think some of us, myself included,  
5 were surprised that this has become such an issue. I would  
6 remind the Court that there has been substantial -- were  
7 there omnibus objections. Lehman had at least two briefs in  
8 support of the omnibus objections as a group, as well as the  
9 documents that went in with each objection individually.  
10 We've had responses -- it's hard to categorize these things  
11 as motions at this point. It seemed to us that they're  
12 opening their case moving for basically reclassification,  
13 which is effectively a dismissal and when it came to  
14 closing, especially if they're taking one hour to address  
15 the pro se issues, which are, as the Court has noted,  
16 similar to the issues that are being raised by the  
17 represented parties, they don't need one hour for each.  
18 They can consolidate those two closing arguments into one,  
19 do that first and, we do believe that we should go second.  
20 It's not a jury trial, Your Honor, so the dramatic impact of  
21 closing second may not be enormous, but I think it's  
22 appropriate under the circumstances.

23 Having said that, Your Honor, I don't think that  
24 anyone's going to disagree with whatever the Court --  
25 whatever approach the Court wishes to take on that issue.

1 THE COURT: Yeah, I think we'll just reserve on  
2 that and I don't think it needs to be decided right now  
3 unless the parties find that it would be useful to have  
4 guidance.

5 MR. SCHAEFFER: Okay.

6 THE COURT: Mr. Miller, do you have a position on  
7 this that you want to express as to the importance to the  
8 process in having guidance on the question of who opens and  
9 who closes at this status conference?

10 MR. MILLER: Well, Your Honor, I think there's  
11 more importance as to who opens than there is as to how the  
12 closing is handled, as I think I suggested before. It does  
13 seem to us that LBHI has been charged with trying to  
14 structure and put together this reclassification process and  
15 we ought to have an opportunity to present a -- sort of our  
16 refined thinking at that point on where we are, what the  
17 issues are and to organize it. So I think opening is  
18 important, and I don't frankly think there's much  
19 disagreement that LBHI should be allowed to open. I don't  
20 think that is the question.

21 I think the question is how the closing would be  
22 handled and I think there the issue is more one of rebuttal.  
23 I think that certainly if there's going to be arguments  
24 particularly by the pro ses, as well as the represented  
25 claimants following the evidence that LBHI should have some

1 opportunity to speak to those and not simply have them  
2 present a long closing and not have some kind of rebuttal.  
3 But in terms of whether that is structured to say a 45-  
4 minute closing by LBHI and an hour and a half or two hours  
5 by the claimants and 15 minutes of rebuttal or whether it's  
6 split in some other fashion, I think that is a fashion that  
7 could be determined later.

8 THE COURT: I think it should be determined later  
9 and at least in my experience in matters that have been  
10 heavily litigated within the Lehman bankruptcy cases, it  
11 doesn't matter because one way or another everything gets  
12 said and very frequently more gets said than needs to be  
13 said.

14 So the order in which it's presented is of no  
15 particular consequence, although it is obvious that after  
16 the claimants have had a chance to say whatever it is they  
17 choose to say at the end of the evidentiary hearing, there  
18 will be an opportunity for LBHI to respond because they will  
19 be hearing arguments made by a group that includes  
20 experienced counsel, but also some individuals that will be  
21 presenting argument for the first time and it's conceivable  
22 that some things may be said that will require clarification  
23 or rejoinder of some sort. So let's worry about that in  
24 2014.

25 Now, before I let you all go, the correspondence

1 mentioned one of my favorite words: mediation. To what  
2 extent, if at all, are the matters that are presented here  
3 susceptible to the efficient use of mediation or in light of  
4 Mr. Miller's comments about being at least notionally  
5 prepared to proceed by dispositive motion, is mediation  
6 simply not a workable concept in a setting in which LBHI  
7 takes the position that no matter what the facts, these  
8 claims all should be reclassified as equity.

9 MR. KAPLAN: Your Honor, Eugene Kaplan for the  
10 Neuberger claimants. We submitted settlement proposals to  
11 LBHI last spring. They responded by saying that while our  
12 proposals were not something they could accept, that they  
13 provided a basis for discussion. We met with them in July  
14 to discuss them. We provided them with additional  
15 information thereafter and low and behold, one day late in  
16 October Mr. Miller called and said that we're not -- we're  
17 only going to make settlement proposals to the -- that  
18 limited group of 2008 commissioned salespeople and nobody  
19 else, without any discussion, without any further  
20 discussion, without any response to our proposals or  
21 anything of the like.

22 Frankly, I don't believe that they conducted these  
23 settlement negotiations as negotiations agree fairly or  
24 anything else, but I believe there is basis for mediation.  
25 I believe that unless -- and maybe it is Mr. Miller's

1 position that under no circumstance will they pay out on any  
2 of these claims other than to these limited commission  
3 salesmen in 2008 -- unless that's his position, I think that  
4 mediation would be fruitful because the issues are, at this  
5 point, are clear, and I think that perhaps a neutral can  
6 make some progress, but obviously we were not able to make  
7 progress on our own.

8 MR. SOLOMON: Your Honor, Lisa Solomon.

9 I join in those comments and I would add that  
10 while Enron is certainly a very relevant case, we have made  
11 various arguments as to why there's no basis for  
12 subordination of the claims here. Arguments that were not  
13 raised in the Enron case, and they were arguments that we  
14 presented to Weil Gotshal and their client at the July  
15 luncheon and we have not received any response. We believe  
16 that there's a very cogent basis to distinguish this case  
17 from the Enron case as a matter of law, as well as on the  
18 facts, because as a matter of law because we have legal  
19 arguments that were not presented, nor considered in the  
20 Enron case. And I think in light of those arguments and the  
21 consideration of both sides with regard to a settlement  
22 earlier on IE because of a luncheon, that it would be  
23 something that should be given serious consideration, a  
24 mediation, as to a possible resolution in this matter.

25 MR. SCHAEFFER: May I one comment? Your Honor,



1 I'm sorry, but I'll make a very brief comment. Mr. Miller  
2 has alluded several times to a distribution that is planned  
3 for April or late March and I know that the Court has  
4 expressed some skepticism that we could get this done in  
5 time for that distribution. Underlying Mr. Miller's  
6 comments is the assumption that this will free up the  
7 reserve. We also have an interest in a March distribution  
8 because we think when this is resolved that we will  
9 participate in it and that's why we pushed, frankly, for a  
10 hearing back in December back in July, the big three-month  
11 gap where we never got a response.

12 If there's a mutual interest in trying to  
13 accomplish nothing a spring distribution, I think an  
14 accelerated mediation process could be the only way to get  
15 to that end.

16 THE COURT: Okay. Thank you.

17 The debtor is the plan administrator throughout  
18 these cases have been advocates of alternative dispute  
19 resolution procedures and they have worked remarkably well,  
20 and so I must conclude that if Mr. Miller says he is not in  
21 favor of mediation, it means that the plan administrator  
22 believes as a matter of law that there's no obligation to  
23 this class, and as a result will offer nothing unless it's  
24 something designed to produce a pragmatic resolution of the  
25 reserve.

1 MR. MILLER: Your Honor, as anticipated, I think  
2 some of the response I have to give -- first of all, let me  
3 say, personally, I am a huge fan of the alternative dispute  
4 resolution and mediations, and I believe that where there is  
5 a -- where there are uncertain legal issues, where there are  
6 differences in facts, where matters have had a scalar  
7 variable, mediation is an extremely powerful and effective  
8 tool and I am a great supporter and I know that the estate  
9 is a great supporter as well. And frankly, I'm always very  
10 reluctant to say that I believe that mediation does not have  
11 a place. I think effectively we've had much through the  
12 process of mediation. We've had several -- a number, I  
13 remember at least two or three face-to-face meetings dealing  
14 with settlement with parties. I think we have laid out the  
15 position of the estate. It's not been terribly welcomed,  
16 but the position of the estate has been pretty simple and  
17 pretty consistent and that is that the Enron case controls  
18 and the sort of undefined distinctions that Ms. Solomon  
19 referred to do not make a difference.

20 And there have been a large number of equity  
21 holders in the Lehman estates who are in the equity class  
22 and 3400 of the 3600 original RSU claimants agreed that they  
23 were in the equity class and there are 200 or so -- a little  
24 over 200 -- of the claimants who chose to go forward and try  
25 to get a result. The estate has tried to look at those

1 claims objectively. We did see a difference that was  
2 somewhat scalar with regard to the category of people that I  
3 mentioned in 2008 who had withholdings for commissions and  
4 never got RSUs. And after thinking about that and looking  
5 at it, we decided to make a two-option settlement proposal  
6 which has been largely accepted by those who -- one of the  
7 other options was accepted. Some of the pro se claimants  
8 did not accept it as you heard it or didn't respond.

9 We do not -- as far as I'm advised, a real  
10 internal analysis was done of this issue because it's large  
11 enough that it went up to the highest levels in the Lehman  
12 organization and the determination was that when you go into  
13 a mediation, there is inherent representation, at least as  
14 far as the estate is concerned, that there is a way to offer  
15 something in the mediation which will induce people to go  
16 away and we felt that might be the case with regard to this  
17 subcategory and we made those offers. I think the estate's  
18 belief is that there's -- based on the message we've  
19 received from those who are represented that what they are  
20 seeking is not a, you know, the cost of what the hearing  
21 would be spread over 200 claimants, which I would frankly be  
22 happy to talk with them about if they'd like to when we're  
23 finished, but a significant monetary payment on something  
24 that we believe, from a legal standpoint is equity, and  
25 monetary payments have not been made on things that were

1 equity at any time in these estates and it's a matter of  
2 principle that LBHI doesn't see itself able to suggest that  
3 we believe that a mediation is going to change that at all  
4 or other alternate substitute resolution procedure.

5 Obviously, we will do whatever the Court asks us  
6 to do and if the Court feels that if an ADR is useful, we  
7 will go through that cost. I might add that the estate does  
8 not believe that this is when it ought to pay all the costs  
9 up. Where the estate thinks that the ADR is worthwhile, it  
10 has borne all the costs in the other ADR processes.

11 THE COURT: Okay.

12 MR. MILLER: If the claimants want to contribute  
13 money and try to have an ADR, we'll certainly consider that,  
14 but we don't think that we should be directed to go to an  
15 ADR and bear the costs.

16 THE COURT: I'm not directing anything; I was just  
17 asking the question.

18 MR. MILLER: All right. Thank you, Your Honor.

19 THE COURT: And based upon the responses, it  
20 appears that some of the claimants, through counsel, believe  
21 that mediation could be a useful process to pursue. I read  
22 Mr. Miller's comments as indicating support and a strong  
23 belief in the efficacy of mediation, but a belief that in  
24 this instance mediation is not likely to be useful because  
25 the estate adheres to a particular view as to applicable law

1 and as to the appropriate treatment of these claims.

2 And so, under the circumstances, I believe it to  
3 the parties, if they wish to talk or to move some or all of  
4 this to mediation, but I'm certainly not going to direct it.

5 Is there anything more for the status conference?

6 MR. MILLER: LBHI has nothing further, Your Honor.

7 MR. SCHAEFFER: Just one brief point, Your Honor,  
8 which is that I tried to describe in my letter to the Court  
9 yesterday, the structure that we have for the evidentiary  
10 hearing procedures order under discussion. I did point out  
11 that there was some briefing that was not strictly in  
12 accordance with the Court's chamber's rules in lieu of a  
13 pre-trial order. The order provides for pre-trial briefs  
14 and opposition briefs by each party. I did want to call  
15 that to the Court's attention in case the Court had some  
16 contrary guidance it wanted to offer.

17 THE COURT: As far as I'm concerned, the parties  
18 should do this on an ad hoc bespoke basis so that you're  
19 dealing with the specific needs of this dispute and we don't  
20 need to worry about adherence to other general procedures.

21 MR. SCHAEFFER: Thank you, Your Honor.

22 I have nothing further.

23 THE COURT: We'll move on to the next agenda item  
24 and those who are involved in this may be excused.

25 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

1 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

2 MR. HORWITZ: Your Honor, Maurice Horowitz, Weil  
3 Gotshal & Manges, on behalf of the plan administrator.

4 The first two contested matters on this morning's  
5 agenda are the debtors' 117th omnibus objection to claims  
6 and 173rd omnibus objection to claims. The planned  
7 administrator is proceeding with respect to only certain  
8 claims identified on a notice of hearing that was filed on  
9 those two objections. Ralph Miller will be handling these  
10 together.

11 MR. MILLER: Your Honor, Ralph Miller again for  
12 LBHI, the planned administrator. With me, at the counsel  
13 table is my colleague, Erika del Nido. I'm not certain that  
14 I have seen counsel for the claimants in the courtroom and  
15 would like to -- there has been a response filed, so there's  
16 a response, but I mean to determine whether he's present or  
17 dialed in or here or not.

18 THE COURT: Is we're dealing with the debtors'  
19 117th omnibus objection to claims and the responses of  
20 Shashank Agrawal, Joanna Baricevic and William Connors, is  
21 that right?

22 MR. MILLER: There are six, Your Honor. Was that  
23 six names? I'll get those for you, Your Honor, if there's a  
24 question.

25 THE COURT: I'm just looking at the agenda. I'm

1 just trying to understand what we're trying to ascertain as  
2 represented or not represented at the moment.

3 MR. MILLER: Yes, Your Honor. That is correct.

4 On the agenda, it describes them correctly, Your  
5 Honor. And the same counsel represents the parties on the  
6 173rd omnibus objection.

7 THE COURT: Is there anyone here in connection  
8 with the 173rd omnibus objection, other than Mr. Miller?

9 Is there anyone on the telephone?

10 There's no response.

11 Mr. Miller, how do you wish to proceed?

12 MR. MILLER: Well, Your Honor, the reason that we  
13 had presented these to the Court is because there was  
14 agreement that this was a legal issue and there is a  
15 response. We would like to go ahead and present the legal  
16 issue to the Court and see if we can get some guidance on it  
17 because it is a legal issue that is common to a number of  
18 other claims; however, it is not as clean in many of those  
19 other claims as it was presented in the responses that we  
20 have here where the responses were expressly agreed that  
21 this was a matter that could be resolved as a matter of law.  
22 I would like to go ahead, frankly, and present a very short  
23 argument and then suggest that Court could decide it on the  
24 papers and our argument.

25 THE COURT: Have you had any dialogue with counsel

1 for the claimants? I mean this has been -- this has been  
2 hanging around for more than two years, so one question I  
3 have is whether there's there has adequate and actual notice  
4 to the claimants that this is going to be heard this  
5 morning.

6 MR. MILLER: Well, first of all, Your Honor, there  
7 have been a couple of other matters that have been set with  
8 this counsel and there was dialogue with him on those and I  
9 think that ultimately he decided to withdraw some of those  
10 claims which were similar to these.

11 With regards to this particular set of claims, I'm  
12 advised by my colleague that several voice messages were  
13 left with him about the hearing; that we did not get a  
14 response from him on those voice messages and we've had no  
15 communication from him indicating he had any objection to  
16 the hearing date. In the case of the others, he decided to  
17 affirmatively tell us that he was not going to pursue those  
18 other objections, or that his clients decided not to pursue  
19 them. So I believe that --

20 THE COURT: I'm confused as to the current status.  
21 You certainly are free to make whatever arguments you want  
22 to make right now in very summary fashion, but I'm  
23 uncomfortable granting relief without greater clarity as to  
24 an agreement with counsel for the claimant to be heard this  
25 morning and this is largely a concern based upon an issue



1 that I suppose will come up later in the calendar having to  
2 do with the timing and management of the claims resolution  
3 process in the case.

4 MR. MILLER: Well, I --

5 THE COURT: I don't understand how this popped up  
6 today as a contested matter to be heard. I don't know why  
7 there's a need for it to be heard today and I don't know  
8 whether it's appropriate for it to be heard today unless I  
9 know that the attorney that represents this group, in  
10 effect, is aware of it and consents to it because it seems  
11 as though we have a due process issue, at least from my  
12 perspective. I don't view phone mail messages unreturned as  
13 being the equivalent to the actual notice. The attorney  
14 could be on a trip to Europe.

15 MR. MILLER: Your Honor, maybe -- we've been going  
16 to awhile -- maybe we can adjourn and I could gather all the  
17 information. I've got a couple of different notes that are  
18 not completely consistent on the efforts to notify him. One  
19 of which states that we had spoken to him once about this  
20 matter, and the other possibility is that we might call him  
21 in the break and see if we were able to reach him.

22 THE COURT: Why is this even a matter of pressing  
23 urgency for this morning? Why is this even on the calendar  
24 this morning? Why are we dealing with this now?

25 MR. MILLER: Your Honor, this issue has to do with

1 the claim that employees of LBI can assert compensation  
2 claims against LBHI based on a generalized alter ego theory.

3 THE COURT: Well, we know that that's a  
4 preposterous notion. We don't have to spend a lot of time  
5 on that.

6 MR. MILLER: Well, Your Honor, if we know that's a  
7 preposterous notion --

8 THE COURT: I know that's a preposterous notion  
9 and I know it requires due process and it has been out there  
10 for years as an issue. So my question to you is why are we  
11 dealing with it today in absence of the attorney who's  
12 pressing the claim?

13 MR. MILLER: Well, Your Honor, it certainly was  
14 not our intention to have it dealt with in the absence of  
15 the attorney. We were surprised.

16 THE COURT: Obviously true, but I don't know why  
17 we are going forward without greater clarity and an  
18 opportunity for that attorney to appear and be heard or to  
19 say, you know what, I've given up on that point.

20 MR. MILLER: All right. Well, Your Honor, again,  
21 if we might have a little time to investigate this further,  
22 perhaps, if you want to go forward with the other agenda  
23 items --

24 THE COURT: Let's go forward with the other agenda  
25 items.

1 MR. MILLER: -- we can come back.

2 THE COURT: This one has waited for several years.  
3 It can probably wait for another month.

4 MR. MILLER: All right, Your Honor.

5 So if that's the direction, Your Honor, we will --

6 THE COURT: No, it's not a direction. You're free  
7 to reach out and try to find out what's going on. It may be  
8 that he's not pursuing the issue at all, but it requires  
9 communication.

10 MR. MILLER: All right. Thank you, Your Honor.

11 We'll try to find out more.

12 THE COURT: Okay.

13 MS. MARCUS: Good morning, Your Honor.

14 Jacqueline Marcus, Weil Gotshal & Manges, on  
15 behalf of Lehman Brothers Holdings, Inc. as planned  
16 administrator. That brings us to item number four on this  
17 morning -- maybe it's afternoon -- almost afternoon agenda.  
18 It's the motion of Lehman Brothers Holdings, Inc. for  
19 extension of the period to file objections to and request to  
20 estimate claims, ECF number 40939.

21 On November 20th, Your Honor, we also filed the  
22 declaration of Thomas Banke in support of the motion.  
23 Mr. Banke is the senior director of Alvarez & Marsal, and  
24 has headed the claims reconciliation process. Mr. Banke is  
25 present in court this morning.

1 Pursuant to Section 9.1 of the modified third  
2 amended joint Chapter 11 plan, the plan administrator's  
3 right to object to claims or request estimation of claims is  
4 due to expire on March 6th, 2014, which is the second  
5 anniversary of the effective date or such later date as the  
6 Court may fix for cause shown. Pursuant to the motion, the  
7 plan administrator has requested an 18-month extension of  
8 the claims objection deadline without prejudice to its right  
9 to seek further extensions upon cause shown.

10 In the motion, as well as Mr. Banke's declaration,  
11 we set forth a lot of facts and figures regarding the  
12 astronomical amount and number of claims that have been  
13 claimed against LBHI and its affiliates. Your Honor has  
14 commented frequently over these past five years that these  
15 cases are like nothing else that has come before and that's  
16 most certainly true with respect to the claims matters, as  
17 well.

18 Yet despite the monumental size of the task, the  
19 plan administrator has made amazing progress in the claims  
20 reconciliation process. Creditors filed approximately  
21 69,000 proofs of claim asserting approximately \$1.3 trillion  
22 dollars in liabilities. As of September 30, 2013, the plan  
23 administrator had resolved more than 64,500 claims that  
24 abrogate more than \$1.2 trillion dollars.

25 Another metric that the Court might find useful is

1 that to date, the plan administrator as distributed more  
2 than \$62.8 billion dollars to holders of more than 25,000  
3 allowed claims. As of the date the motion was filed, the  
4 plan administrator had reconciled 61 percent of the claims  
5 that were unresolved as of the effective date and 93 percent  
6 of the total claims asserted against the debtors.

7 Since the motion was filed, additional claims have  
8 been reconciled resulting in the further reduction of  
9 disputes claims by \$3.2 billion dollars. We believe that  
10 the results achieved to date demonstrate that the plan  
11 administrator has worked diligently and effectively on the  
12 claims reconciliation process and that extension of the  
13 objection deadline is appropriate. In addition, an  
14 extension of the objection deadline would benefit all  
15 creditors who after all bear the professional fees of these  
16 estates, because it will enable the plan administrator and  
17 its team to continue to focus on the more efficient  
18 consensual resolution of claims rather than litigation.

19 We've laid out in the motion, Your Honor, that the  
20 Court has ample authority under various provisions of the  
21 plan, as well as the Bankruptcy Code to grant the requested  
22 extension. The term of the extension, 18 months, we believe  
23 is appropriate because we cannot be sure that we will be  
24 able to sustain the current pace of claims resolution. As  
25 you can imagine, we have weeded out many of the disputes

1 that were easier to deal with and as we move forward over  
2 the next year, we'll be moving with some of the more complex  
3 and difficult claims issues which are likely to work  
4 through. The requested extension will not prejudice the  
5 rights of creditors holding disputes claims that have not  
6 yet be objected to because pursuant to Section 8.4 of the  
7 plan, the plan administrator maintains reserves for  
8 liquidated disputes claims pending resolution.

9 Your Honor, we've laid out in the reply the way  
10 that we've categorized the objections. There are eight  
11 objections that have been filed. We've categorized them as  
12 type one objections and type two objections. There are five  
13 type one objections and the description of type one  
14 objections, these are creditors whose claims have already  
15 been objected to, so technically, the relief that we seek  
16 doesn't even apply to them, but they basically responded --  
17 and if I can summarize -- basically say this process is  
18 taking too long, why can't you process our claim?

19 The relief for requests -- excuse me -- basically,  
20 these objectors are collaterally attacking the claims  
21 procedures order rather than the motion or the proposed  
22 order that the debtors are seeking today, Your Honor. We  
23 recognize that everybody would like to have their claims  
24 resolved as soon as possible. We're making our best efforts  
25 to do that, but obviously, these things take time.

1 We believe that the type one, five objections  
2 should be overruled and for the benefit of the Court, those  
3 objectors are QVT Fund, LP and several pro se claimants, Ann  
4 Judd, K -- and I apologize to the pronunciation --  
5 Sayhimovan (ph), Barry O'Brian, who I believe is in the  
6 court today, and Charles W. Showner (ph).

7 With respect to the type two objections, Your  
8 Honor, there are there objections listed on the docket.  
9 Those objections are Highland Capital, Depfa Bank and  
10 Russell Investments. We've responded to the specifics of  
11 each of these objections in our reply. Suffice it to say  
12 that none of these objections asserts a legitimate basis for  
13 denial of the requested relief. Each one of these parties  
14 essentially says, my claim is easy to deal with, why do you  
15 need 18 months to deal with my claim?

16 What they fail to recognize is that there are  
17 holders of 4500 claims that feel the same way and everybody  
18 can't go first. In ruling on the motions we believe that  
19 it's incumbent upon the Court to take into account the  
20 interests of all creditors and the estates as a whole. When  
21 viewed in that perspective, the extension requested by the  
22 plan administrator is very reasonable.

23 If the objection deadline is not extended and the  
24 plan administrator is required to file objections to the  
25 remaining unreconciled claims, then the reconciliation

1 process will be slower and more costly for the estates which  
2 will harm all creditors. Consequently, for the reasons set  
3 forth in the motion and in the declaration of Mr. Banke, the  
4 plan administrator requests that the Court enter an order  
5 extending the claims objection deadline to September  
6 6th, 2015.

7 Your Honor, before I answer any of your questions,  
8 and you have the opportunity to hear from the objecting  
9 parties, I'm also mention that we did get an inquiry, rather  
10 than an objection from an additional creditors, that was  
11 Giants Stadium. Giants Stadium requested that they be  
12 carved out of the proposed order. As Your Honor is aware,  
13 the debtors and Giants Stadium have been involved in a  
14 dispute for a long time. We've been before you numerous  
15 times with discovery disputes in other matters.

16 On October 23rd, the debtors commenced an  
17 adversary proceeding against Giants Stadium seeking to  
18 recover approximately \$94 million plus interest in  
19 connection with a derivatives contract. After careful  
20 consideration and in view of the fact that they intend to  
21 file an objection to the Giants Stadium claim shortly and  
22 conduct discovery regarding the complaint and the objection  
23 contemporaneously, the plan administrator has agreed to  
24 carve out Giants Stadium from the proposed relief which  
25 will -- and the three Giants Stadium claims will remain



1 subject to the existing claims objection deadline.

2 We've revised a proposed order and submitted it --  
3 or sent it to Giants Stadium's counsel. They've approved  
4 the form of the order and at the appropriate time, I can  
5 hand up a blacklined copy of the order.

6 THE COURT: I'm not inclined to disagree with any  
7 understandings that you've reached with Giants Stadium, but  
8 I think it's preposterous to use that word again, that any  
9 claimant would seek a carve out. That's not what this is  
10 about. We're engaged in an argument about appropriate case  
11 administration on a global basis. I'm not inclined to grant  
12 the request even though you have said yes to it, and since  
13 it's my order, they're not to be excluded.

14 If there are adverse consequences to your dealings  
15 with Giants Stadium as a result of my remarks, I'll  
16 reconsider them, so I need more argument as to why any party  
17 should be excluded from a broad based case administration  
18 order of this sort. I think it's an outrageous request.

19 MS. MARCUS: With respect, Your Honor, to Giants  
20 Stadium and whether this adversely affects our  
21 relationship -- I don't know if we can use that term --

22 THE COURT: It's a pretty toxic relationship as it  
23 is, so it's hard to imagine how anything could make it  
24 worse.

25 MS. MARCUS: Your Honor, even if the Court does

1 not carve out Giants Stadium -- obviously, it's your  
2 prerogative to do that -- we would still have the ability to  
3 file the objection sooner rather than later, right?

4 THE COURT: You could file the objection today.

5 MS. MARCUS: Exactly.

6 I don't know if Giants Stadium's counsel is  
7 present in the courtroom or not.

8 THE COURT: Fine. I'm not carving out Giants  
9 Stadium. I'm not carving out anybody, and I don't think  
10 that any party in interest should ever be incentivized to  
11 seek separate treatment, especially when there's a pending  
12 adversary proceeding and the parties are fully engaged. I  
13 view it as an example of overlawyering, not to be  
14 encouraged.

15 MS. MARCUS: That's all I got, Your Honor. We  
16 request that you grant the motion.

17 THE COURT: It's really a shame that nobody from  
18 Sullivan & Cromwell is here for purposes of that little  
19 speech. Maybe there's an associate who took notes?

20 Okay.

21 MS. KELLER: Your Honor, may I be heard?

22 THE COURT: Sure.

23 MS. KELLER: Your Honor, respectfully, I'm Robin  
24 Keller from Hogan Lovells representing QVT Financial, which  
25 is a New York based hedge fund manager for investment funds,

1 QVT Fund, Quintessence Fund, Piney Branch Fund.  
2 Collectively, the QVT Funds had over half a billion dollars  
3 of exposure to various Lehman entities around the world and  
4 in the U.S., their primary claims are complex derivatives  
5 termination damages claims of over a quarter billion dollars  
6 in amount, particularly involving preferred securities  
7 default swaps with LBSF, which were guaranteed by LBHI.

8 Your Honor, QVT has managed to stay out of this  
9 court for five years, but at this point, we need two or  
10 three minutes of Your Honor's time in attention to this  
11 matter, because QVT believes it is being subjected to  
12 abusive discretion by the estate representatives and  
13 arbitrary treatment in the manner in which the claims  
14 resolution process is being applied to it. We believe that  
15 we are impacted by the motion to extend time because that  
16 request permits the debtor to assert additional objections  
17 to claims that have already been objected to which the QVT  
18 claims have been.

19 THE COURT: Ms. Keller, let me just break in and  
20 ask you one question. In the plan administrator's opening  
21 presentation, various claimants were put into so-called type  
22 one or type two. You acknowledge that you're a type one?

23 MS. KELLER: We're a type one.

24 THE COURT: So issue has been enjoined?

25 MS. KELLER: Correct, Your Honor.

1 THE COURT: Then why is this an issue for you?

2 MS. KELLER: Let me explain briefly.

3 QVT filed a number of claims, all the supporting  
4 documentation. Those claims were objected to two and a half  
5 years ago in 2011. QVT filed responses to the objections at  
6 which point they were adjourned indefinitely by the debtors;  
7 however, QVT was approached by the debtors to engage in  
8 informal review and negotiation of the claims in early 2010,  
9 over three years ago and since then, QVT has devoted  
10 extensive time and effort to producing full transparent  
11 comprehensive back up to the estate representatives  
12 supporting the calculations of its damage claims including  
13 providing 13 different packages of analysis presenting its  
14 positions on different aspects of its claims responding to  
15 Lehman's questions and comments and receiving minimal  
16 substantive feedback from Lehman in support of itself  
17 conflicting calculations.

18 There have been more than a does phone calls and  
19 meetings between QVT representatives and the estate  
20 representatives over this time period, including a  
21 presentation by QVT's expert witness Professor Paul  
22 Flighterer (ph) to the Lehman negotiating team.

23 As I said, our claims were objected to two and a  
24 half years ago but with no substantive basis put forward by  
25 Lehman other than the claims were too high. So literally

1 after years of discussion without resolution the estate  
2 representatives approached QVT earlier this summer to work  
3 out an ad hoc mediation approach, and on July 13th of 2013,  
4 QVT confirmed in writing to those representatives its  
5 agreement to the mediation process proposed, which it  
6 expected to commence in the third quarter of this year.

7 After a lengthy period of silence, the estate  
8 representatives asked for yet another conference on the  
9 claim, claims which occurred in early October, without any  
10 resolution, and to date, they have failed to respond to  
11 QVT's calls about getting the mediation process started.

12 Your Honor, Lehman characterizes QVT as one of the  
13 claimants seeking to compel the plan administrator to  
14 resolve objections to particular creditor claims, quote,  
15 immediately. They call QVT's complaint about the way it's  
16 being treated a collateral attack on the claims procedures  
17 and state that QVT should not be allowed to skip to the head  
18 of the line. These generic responses are simply not  
19 applicable to QVT's situation. QVT recognizes that the  
20 debtor has to have discretion in how it manages a claims  
21 portfolio of this size, but there is also such a thing as an  
22 abuse of discretion, and we submit that deliberately or not,  
23 QVT has become the victim of such abuse.

24 It is not fair and equitable exercise of  
25 discretion to put a claimant through a never-ending process

1 of having to explain and justify and support its claims with  
2 no prospect for resolution unless it gives in to what it  
3 believes is a mismarked book and an unjust valuation for its  
4 damages. QVT has no recourse under the procedures approved  
5 by this Court unless the Court orders the plan administrator  
6 to stop stringing QVT along with its start and stop  
7 approaches.

8 THE COURT: Ms. Keller, let me just break in for a  
9 second. It's already more than the three minutes that  
10 you've asked for.

11 This is an order requested by the debtor that I've  
12 already indicated is designed for general application to all  
13 4500 claimants that have not been resolved to this point, if  
14 that's the correct number. It's at least a good  
15 approximation for the number and you have an unresolved  
16 claim. Your argument feels like it's very parochial,  
17 understandably you're representing a client and you're being  
18 opportunistic by taking this opportunity to object to  
19 something as a means to call attention to your unresolved  
20 claim.

21 Let's just say for the sake of discussion that I'm  
22 sympathetic to the fact that you and certain other claimants  
23 have had to wait awhile, but there's a big "so what" that  
24 follows that because there's nothing that special about QVT,  
25 other than it happens to be your client. It's one of a

1 class of, as yet, unresolved claims, presumably with some  
2 complexity, because I'm guessing that derivatives are  
3 involved in one fashion or another, and so how do you make  
4 this a sympathetic argument when it's being raised in a  
5 context of a case administration motion that I've already  
6 said in the context of the requests by Giants Stadium for  
7 special treatment will not involve special treatment for  
8 anyone?

9 That was a shot across every objector's bow, as  
10 well as a direct shot at Giants Stadium that at least  
11 throughout this period of maybe three years as been very  
12 actively involved in difficult litigation and should know  
13 better than to inject itself into a broad-based case  
14 administration order such as this, but that's a detail. The  
15 general proposition is I recognize that parties raise their  
16 hand and say what about me all the time and there's  
17 absolutely nothing wrong with raising and objection and  
18 seeking special attention if you can get it, but what does  
19 that have to do with the pending motion?

20 This isn't a motion to compel attention to your  
21 claim, but that's the effect of your objection.

22 MS. KELLER: Your Honor, if I may respond. We are  
23 not seeking to be carved out of the objection, but given --  
24 we're not asking to be moved to the head of the line, but  
25 we're asking not to be pushed to the back of the line in an

1 order Your Honor is being asked to enter which is a blanket  
2 approach to dealing with thousands of remaining claims.

3 Your Honor, this plan, as you know, was confirmed  
4 over 18 months ago and a lot of money is being held back for  
5 QVT pending the resolution of disputes over its claim which  
6 QVT would rather have in hand and be able to invest. And  
7 the point is that QVT has been a good citizen. They've done  
8 a lot of work to help the debtors understand. They've  
9 participated in the process throughout. They've been more  
10 than patient and they've been offered the opportunity to  
11 mediate, which you said previously is one of your favorite  
12 words, and we want to mediate. We're ready to mediate.  
13 Lehman knows everything about our claim situation, but can't  
14 seem to close the gap with us.

15 And I don't think it's fair that they've given a  
16 blank check to invite counter parties to the table and say,  
17 oh, nevermind, we'll see you in 18 months or two years. It  
18 is an abuse of process, Your Honor, and that's what we're  
19 here to raise.

20 THE COURT: Well, let's --

21 MS. KELLER: And so we raise this objection, but  
22 we ask that you ask the debtor or advise the debtor to stop  
23 playing games and stringing us along.

24 THE COURT: Well, you're the first to stand up, so  
25 this becomes an opportunity for me to provide some



1 foreshadowing as to anybody else who might stand up. This  
2 seems to be -- pardon me of my use of the term -- a  
3 misappropriation of this motion practice to obtain  
4 preferential treatment or, if not preferential treatment, to  
5 try to gain a procedural advantage relative to timing all in  
6 the context of a motion that simply pushes out an end date,  
7 that in the context of the confirmed plan, has proven to be  
8 too tight, consistent with the orderly resolution of all of  
9 the as yet unresolved claims.

10 So while I understand the motivation on your part  
11 and the part of the other objectors, I'm quite unsympathetic  
12 at least in this context. I understand the desire of each  
13 claimant that does not yet have a resolved claim to be  
14 processed, if I can use that term, and to fall into the  
15 class of the claimants that will then have an entitlement to  
16 catch up distributions and future distributions and the  
17 amounts involved are quite apparently significant. But the  
18 amounts that are significant include not only the dollars  
19 involved, but the unfinished work that needs to be done and  
20 everyone in that category presumably has cause to assert a  
21 personal priority and ask what about me?

22 You sat through the somewhat lengthy proceeding  
23 that we started with today involving RSUs and CSAs and  
24 represented claimants and unrepresented claimants and the  
25 somewhat difficult process then being discussed for dealing

1 with these claims. That is but one example that anecdotally  
2 happens to be today's example of the complexities of this  
3 case, and so I'm granting the motion. I'm not carving  
4 anybody out from the motion, but I'm suggesting that those  
5 parties that cared enough to file objections or to complain  
6 about process continue to do just that, continue pressing  
7 for resolution. And particularly where a party like your  
8 client is interested in mediation and has, according to your  
9 comments and your papers, a right of claim for resolution,  
10 maybe there's another way to get this resolved.

11 MS. KELLER: Your Honor, we would love to know  
12 what that is because procedurally, we find ourselves in a  
13 real Catch-22 here. Our claims were objected to, but  
14 adjourned indefinitely. We're not on the calendar.

15 THE COURT: I understand.

16 MS. KELLER: We've asked for mediation. We can't  
17 get mediation, and we don't know when we will ever get to  
18 resolution. I understand others feel the same way, but  
19 we've invested a lot of time and effort in trying to make it  
20 as easy as possible for the estate to resolve this  
21 substantial claim.

22 THE COURT: I understand, and one of the things  
23 that also happened this morning is that we had a contested  
24 matter relating to alter ego claims of employees arguing  
25 that claims against LBI were actually claims against LBHI

1 under some doctrine. That's when I first used the word  
2 preposterous today, and one of the things that is somewhat  
3 opaque from the Court's perspective, and I presume also from  
4 the perspective of parties who are objecting to this relief  
5 is that largely because so much of what goes on in case  
6 administration occurs outside the courtroom, it is never  
7 clear to me until a day or two before we have a hearing,  
8 whether it's on claims or on general matters, what the plan  
9 administrator is going to dishing out for the Court to deal  
10 with. That's just the way it works.

11 It's not my job to micromanage the administration  
12 of any case that's assigned to me, but it is my job to deal  
13 with matters that are presented to me. I don't determine  
14 the priorities: the parties do. I don't know if there's a  
15 procedure or if there should be a procedure for determining  
16 who comes first. And Ms. Marcus made the comment in her  
17 opening presentation and it's true everybody wants to be  
18 first, so I have a suggestion and it's not in the nature of  
19 the granting of any relief. It would be more desirable if  
20 this process were more transparent in offering parties  
21 within the class of not yet allowed claims or not yet  
22 disallowed claims to understand how determinations are being  
23 made as to who comes first or who gets earlier treatment or  
24 who gets deferred because while I have heard your argument  
25 about abuse of process, there's no record here to support

1 that argument and I don't find based on my own experience in  
2 administering this case that there's been any abuse by the  
3 debtor and the plan administrator, but that's not to say  
4 that some party might not be able to make such an assertion  
5 and that's not to say that there might not be an instance  
6 where a finder of fact might be persuaded that that is true.

7 So I'm letting everybody know that it's my  
8 intention to grant the relief in this procedures motion.  
9 It's purely procedural. The impact, however, of extending  
10 the time to September of 2015 remains to be seen. I don't  
11 know how the plan administrator intends to proceed with  
12 ordering this massive workload, this still massive workload,  
13 nor do I know what's really in the pipeline in terms of  
14 claims that have been previously objected to, the time one  
15 claims, that may be susceptible to mediation or some sort of  
16 agreed resolution as opposed to having contested matters  
17 decided by the Court.

18 So what I'm going to suggest in the context of  
19 granting this relief is that there also be a better window  
20 into the process so that parties who are anxious to have  
21 their claims resolved might have some ability to understand  
22 why it's not yet timely for their claim to be resolved or it  
23 may be timely and for there to be some broad-based work plan  
24 available for public dissemination or private dissemination  
25 with confidentiality to the extent that this may be

1 sensitive information, as to how the plan administrator  
2 intends, over the period of time between March of 2014 and  
3 September, 2015, to use that time in an efficient and fair  
4 way.

5 Now, no one has asked for that because everybody's  
6 objection is what about me. My response to it is this is a  
7 process-based motion and there should be a process-based  
8 response to it, not only for those who have objected, but  
9 for anybody who may feel aggrieved. So I'm going to propose  
10 that the debtor, plan administrator, with counsel and  
11 advisors come up with -- if they don't already have it -- a  
12 plan. I don't know if such a plan exactly exists as we  
13 speak it may, it may not, but if it doesn't exist, it  
14 should; otherwise, we're simply dealing with a squeaky wheel  
15 concept of case administration and that's, in effect, what  
16 your objection is.

17 So there's no reason, just because you're a  
18 squeaky wheel for you to get the grease, but there should be  
19 a process in which parties within classes and categories  
20 have reasonable expectations as to how their claims are  
21 going to be addressed over time. So I think I've actually  
22 disposed of everybody's objection and I hope that the  
23 process that I am encouraging is helpful not only to the  
24 parties, but also to the debtor plan administrator.

25 Does anyone else wish to be heard on this?

1 MS. KELLER: Thank you. We welcome that  
2 transparency and understand that should we wish to pursue a  
3 claim of abuse of process, we would have to bring a record  
4 before Your Honor, and so I would hope that that would not  
5 be necessary --

6 THE COURT: I would hope that that would not be  
7 necessary, too.

8 MS. KELLER: -- and we will get everything  
9 resolved. Thank you, Your Honor.

10 THE COURT: Okay. Thank you.

11 MR. GUY: Thank you, Your Honor. Jonathan Guy for  
12 Depfa Bank, Orrick Herrington & Sutcliffe.

13 I understand the Court has ruled and we respect  
14 that ruling and we understand that this is based upon it's a  
15 process. We want to make clear that Depfa was not objecting  
16 and saying that we want to be carved out. We were saying  
17 there are categories of claims that are different and  
18 exactly what Your Honor just said is understanding why  
19 certain categories of claims which can be objected to, where  
20 they've been through mediation, where the parties understand  
21 the disputes, where are they in the queue, but we're not  
22 asking for a specific carve out.

23 THE COURT: Okay.

24 MR. GUY: We didn't believe they showed cause as  
25 to those categories, but we understand the Court has ruled,

1 Your Honor.

2 THE COURT: Okay. Thank you.

3 MR. GUY: Thank you.

4 THE COURT: Anyone else wish to be heard?

5 Mr. Vasser?

6 MR. VASSER: Good afternoon, Your Honor.

7 Shmuel Vasser, Dechert, for Russell Investments.

8 And I understand that Your Honor ruled. Fairly few short  
9 comments, one is that we are type two. Our claims have not  
10 objected to and we actually -- why we can't represent  
11 everybody of the 4500 claimants whose claims are still open,  
12 we actually did not ask to be ahead of the line. We didn't  
13 ask for any particular relief for us. We just expressed  
14 Russell's view, which may be misguided, but Russell's view  
15 that the process takes too long and giving the debtors an  
16 additional 18 months without -- with an open option for  
17 extension is just too long.

18 So I understand that Your Honor is going to grant  
19 the motion. I'm just putting it on the record because I  
20 suspect in 18 months I'm going to be here again and making  
21 maybe a similar argument that may be received the same or  
22 differently in 18 months.

23 The second point I just wanted to make the Court  
24 aware of is that in the response to our objection, they  
25 noted that two of your claims are marked as accepted as

1 filed and therefore resolved. We actually knew that, but  
2 when we called the claims agent and we asked what does that  
3 mean, they told us it really doesn't mean anything because  
4 as long as the claim is not allowed, the debtors can still  
5 object to it as long as the deadline runs.

6 I asked LBHI to confirm to me that what it means,  
7 accepted as filed, actually means that they viewed this  
8 claim as allowed and I got this confirmation, but I know  
9 that there are many others, many other claims on the claims  
10 docket that are marked accepted as filed, but nobody knows  
11 what that means. And I think if their view is that claims  
12 that are marked on the claims register as sent as filed are  
13 allowed, then they need to mark the docket appropriately.  
14 Thank you very much.

15 THE COURT: Okay. Thank you.

16 Ms. Marcus?

17 MS. MARCUS: Your Honor, just very briefly.

18 We've heard your comments and we will work with  
19 primarily, I guess, Mr. Banke on a plan. I'm sure that he  
20 has his plan -- it is nothing that I've seen and I will try  
21 to develop something that will be user friendly that we can  
22 share with people who make inquiries. I must say that I  
23 take umbrage at the suggestion that there's been an abuse of  
24 process here because that's just simply not the case. In  
25 fact, the facts referred to by Ms. Keller in her objection



1 reflect that we have engaged with QVT over an extended  
2 period of time, but I guess that's for another day.

3 We will submit the original order, I suppose,  
4 right?

5 THE COURT: The original order?

6 MS. MARCUS: Without the carve out?

7 THE COURT: Without the carve out.

8 MS. MARCUS: Okay.

9 THE COURT: It's a no carve out order, but it's  
10 a -- with some effort to clarify in a way that is observable  
11 by claimants the process and procedures that will be applied  
12 on a go forward basis to resolving the 4500, as yet,  
13 unresolved claims.

14 MS. VOLKOV: Your Honor, would that be a provision  
15 in the order?

16 THE COURT: It's simply part of the record.

17 MS. MARCUS: Okay. Thank you, Your Honor.

18 MS. VOLKOV: Your Honor, Ilana Volkov for  
19 Highland. I was not going to get up, but it just occurred  
20 to me -- I'm wondering whether to help the transparency it  
21 makes sense to have a status conference sometime down the  
22 road so that aggrieved party can be heard to the extent that  
23 the transparency is not as transparent as the parties would  
24 like it to be and just to keep the process moving along.

25 THE COURT: I don't think that's a terrible idea

1 because it provides some accountability as to how this  
2 concept will be, in fact, implemented, and my suggestion is  
3 that we simply have a status conference on claims procedures  
4 and priorities as an agenda item, say in three months.

5 MS. MARCUS: That's fine, Your Honor. We have no  
6 problem with that.

7 The one thing I do want to caution, I guess  
8 everybody, about is this plan we're going to be sure not to  
9 disclose things that are attorney-client issues.

10 THE COURT: Of course. I'm talking about a broad  
11 concept that gives parties some sense as to the rationality  
12 of the work plan for dealing with the, as yet, unresolved  
13 claims to that parties have an ability to, in effect,  
14 calendar, when in the reasonable future their claim might be  
15 the subject of either a motion or negotiations to resolve  
16 it.

17 MS. KELLER: Your Honor, it would also be really  
18 helpful if there was a person identified at the plan  
19 administrator that would be responsible for this and who we  
20 could talk to about where we might fit in.

21 THE COURT: That might be absolutely true, but I'm  
22 not going to be drafting this today, so parties can send  
23 letters to Ms. Marcus, who I think will end up as the  
24 clearinghouse as suggestions. I'm not trying in this  
25 suggestion to create a burden or significant incremental

1 work, rather, I am proposing a procedure that will enable  
2 those whose claims remain unresolved to better understand  
3 why they are waiting and when they can reasonably anticipate  
4 the claims within a certain category. For all I know, it  
5 may be alphabetical. I have no idea how we're dealing with  
6 priorities will be heard -- I'm not suggesting, by the way,  
7 in that little aside, that I think an alphabetical order  
8 makes sense -- but people tend to organize information in  
9 rationale ways or like my desk, stuff is just thrown on it,  
10 but I know how to find it, mostly.

11 MS. MARCUS: I tell people that too.

12 THE COURT: So my point is that there's either a  
13 rational approach to organizing this data or there's an  
14 irrational one which also works, but -- and I'm not telling  
15 you how to do it -- I'm just asking you to make it clear to  
16 third parties what's going on.

17 MS. MARCUS: That's fine, Your Honor, and just to  
18 point out in terms of a contact person, every single omnibus  
19 objection that we filed -- obviously, this only applies to  
20 people whose claims have already been objected to -- but  
21 every single bus omnibus objection has the name of a Weil  
22 Gotshal associate and a phone number to contact them and  
23 it's amazing how many people don't look at the objection and  
24 call somebody else, but if those people are contacted, they  
25 are the best people to be able to respond to status or to

1 follow-up and get an answer for somebody. I think we'll  
2 deal with that in the plan.

3 THE COURT: Okay.

4 MS. MARCUS: Thank you, Your Honor.

5 THE COURT: Thank you.

6 MS. MARCUS: The next matter will be handled by  
7 Mr. Horwitz.

8 THE COURT: Okay. And everybody who's involved in  
9 that last matter can be excused.

10 MR. HORWITZ: Your Honor, before we go into the  
11 last matter on the contested -- or on this morning's agenda,  
12 I wanted to report that my colleague, Erika del Nido has had  
13 an opportunity to speak to the counsel for the two veil  
14 piercing objections and is able to report at least to the  
15 Court what that attorney would like to do.

16 THE COURT: All right.

17 MS. DEL NIDO: Good afternoon, Your Honor.

18 Erika del Nido, Weil Gotshal & Manges for Lehman  
19 Brothers Holdings, Inc. Your Honor, well in advance of this  
20 hearing, my colleague, Maurice Horwitz, and I spoke to  
21 Mr. Bruce Duke. He is counsel representing those six  
22 claimants to try and set a hearing date. We told him about  
23 the November hearing. He raised no objection. He said that  
24 he desired to follow up with the claimants that he was  
25 representing.

1           Subsequent to that, we left him several voice  
2           messages to follow up to see the status. At the brief  
3           intermission today, Your Honor, I spoke to Mr. Duke on his  
4           cell phone explaining what was going on today. He informed  
5           me that he desires to go forward on his papers alone. He  
6           does not wish to make any additional oral argument and he  
7           would like to stand on what he has submitted.

8           THE COURT: All right.

9           MS. DEL NIDO: Thank you, Your Honor.

10          THE COURT: Mr. Miller, on that basis, to you wish  
11          to press your argument today?

12          MR. MILLER: Your Honor, we would like to try to  
13          get a ruling. I think you've already characterized these  
14          claims, but we have a number of people who are making this  
15          same argument and you've alluded to the difficulty of claims  
16          administration, getting some clear guidance on this issue  
17          will assist with claims administration, so we would like to  
18          go forward with the papers, if we could.

19          If I could have two minutes to just point out the  
20          important things in the papers.

21          THE COURT: Why don't you proceed, and as to the  
22          last matter on the agenda that is coming back after about 18  
23          months of unexplained absence, I'm inclined to adjourn that  
24          until 2:00 because it may take a little time and it's now  
25          almost 12:30. So my understanding is that the 2:00 calendar

1 has cleared. My courtroom deputy told me that we received a  
2 call indicating that the Fannie Mae matter is being  
3 adjourned to another date. I just want to clarify that to  
4 make sure that we have time at 2:00 for the Caisse Des  
5 Deposts Et Consignations. It sounds a little sexy.

6 MR. MILLER: So, Your Honor, can we go ahead and  
7 submit the 117th and 173rd objection issue briefly before we  
8 adjourn?

9 THE COURT: Let's deal with the matter at hand  
10 before we adjourn and then the renewal of the issue of the  
11 late filed proof of claim can be heard at 2:00 if that's  
12 okay with everybody?

13 MR. MILLER: That certainly works with LBHI, Your  
14 Honor.

15 UNIDENTIFIED SPEAKER: That's fine, Your Honor.

16 THE COURT: If you wish, you can be excused and  
17 come back at 2:00. It's up to you.

18 MR. MILLER: I can make this very brief, Your  
19 Honor: papers that the respondent wants to rely on makes  
20 only one objection or response to the objection and it is  
21 quote, submit it is submitted by claimants that LBHI is the  
22 alter ego of LBI and as such, LBHI is ultimately responsible  
23 for the obligations of LBI, including those of claimants.  
24 LBHI's attempting to construct an artificial distinction  
25 between it and LBI in order to avoid legitimate compensation

1 claims of payment of claimants. That's in paragraph 12 of  
2 the response in issue to the 117th omnibus objection and  
3 paragraph 10, identical paragraph, to the 173rd.

4 The three claimants in each of those that are the  
5 subject of this particular hearing have all identified  
6 themselves as, quote, claimants are all former employees of  
7 LBHI through one of its wholly owned subsidiaries, LBI, or  
8 an affiliate of LBI.

9 Now, the Court can, of course, take judicial  
10 notice of the fact that LBI is the subject of proceeding  
11 before it under those Securities Investors Protection Act  
12 and it is a debtor in solvency proceeding. The Court is  
13 also take judicial notice of the fact that there are  
14 numerous representations in that it's a Delaware  
15 corporation. LBI is in a Second Circuit in a landmark  
16 decision by Judge Pollak held that a claim alleging that a  
17 debtor or bankrupt is the alter ego of its controlling  
18 stockholder constitutes property of the bankruptcy estate or  
19 the debtor in possession and it can only be asserted by the  
20 trustee or the debtor in possession, and that's the call  
21 Vorhees case, 8 fed 3rd 130 at 132. The doctrine was  
22 reaffirmed and applied to a Delaware corporation like LBI by  
23 Judge Gonzalez in Duke Energy Trading and Marketing v Enron,  
24 a 2003 case, that we cited to the Westlaw cite in the brief.  
25 Judge Gonzalez wrote, based on the fact that Delaware law

1 allows a subsidiary to maintain an action against a  
2 corporate parent, Courts have found that a Delaware Court  
3 would permit a debtor corporation to assert a claim to  
4 pierce its own corporate veil, and there are some citations.

5 He then said, thus, the trustee or debtor in  
6 possession would have an exclusive standing to maintain a  
7 Delaware corporations alter ego claim of a general nature.

8 All of the elements of that holding apply here.  
9 The response also said, and I think it's been reconfirmed by  
10 the information reported, quote, a hearing is not required  
11 to dispose of an objection, rather, this Court may apply a  
12 summary judgment especially when as in the case sub judice  
13 there are no genuine issues of material fact. That's what  
14 the response said in paragraph 13 of the response at issue  
15 in 117th in paragraph 11 of the response to the 173rd.

16 So this has been submitted. The facts are clear.  
17 This is a generalized alter ego claim. There is a sound  
18 policy raised which is apparent to the Court for gathering  
19 the value of an alter ego claim into a debtor like LBI so it  
20 can be distributed throughout the rest of its creditors, all  
21 of its creditors, and not by individual creditors can assert  
22 an alter ego claim for a debtor.

23 And in this particular case, the system has worked  
24 just like it was supposed to because in the record that the  
25 Court has is the fact that a settlement was achieved between



1 LBI and LBHI and one of the claims that was released was the  
2 possibility of alter ego claims. The unredacted version of  
3 that has been provided to the Court.

4 If there is any value in a claim that LBHI  
5 improperly dominated its subsidiary, that value should have  
6 passed through such a settlement to LBI and claimants who  
7 are making the claims that these parties are and claims like  
8 it that they were employees of LBI, they had compensation  
9 claims against LBI, if they recover on those compensation  
10 claims against LBI and the LBI estate now has more value in  
11 it because of its settlement with LBHI hypothetically, then  
12 they will get the benefit of that value and share it with  
13 all of the rest of the creditors.

14 So the system has worked here the way that it was  
15 supposed to work. And the proposed orders that we have  
16 submitted would rely solely on the standing issue and they  
17 would make it clear that for these generalized alter ego  
18 claims where somebody -- and we've got these claims  
19 disbursed through a lot of other claims, usually mixed with  
20 other things -- that there is not standing for employees of  
21 LBI to assert compensation claims, and frankly, we think it  
22 may apply to broader contexts but that's the context before  
23 the Court.

24 Under the Second Circuit ruling in Cobb and other  
25 cases that follow it and especially the explanation of that

1 by Judge Gonzalez in Duke Energy Trading and that's, Your  
2 Honor, what we would like to have established, if at all  
3 possible, for clarity and to assist us going forward.

4 I'd be happy to take any questions, Your Honor,  
5 but that's the issue that's been submitted.

6 THE COURT: I have no questions. The outcome here  
7 is clear. These individual former employees of LBI do not  
8 have standing to pursue claims against LBHI on an alter ego  
9 theory. I will enter the order that so provides and would  
10 simply observe the obvious. The LBI estate is being  
11 separately administered by Mr. Giddon (ph) as SIPA trustee.  
12 The LBHI estate has been separately administered as a  
13 Chapter 11 case that resulted in a confirmed plan in  
14 December of 2011.

15 The estates are distinct and will always remain  
16 so. The employees of LBI have whatever rights they have in  
17 that proceeding. They have no rights in the LBHI case  
18 unless, of course, they have other grounds to assert claims  
19 other than their status as LBI employees.

20 MR. MILLER: Thank you, Your Honor.

21 We have submitted the orders, I believe, already,  
22 and we have discs -- we have them on disc.

23 THE COURT: Fine, then we'll return at 2:00.  
24 We're adjourning for lunch.

25 MR. MILLER: Thank you for your time, Your Honor.

1 THE COURT: Thank you.

2 (Recess at 12:31 p.m.)

3 THE COURT: Be seated, please.

4 Good afternoon.

5 Do you want to proceed?

6 MR. HELLMAN: Thank you, Your Honor.

7 Good afternoon, Jay Hellman, Silverman Acampora  
8 for the movant for purposes of the motion today, so I'll  
9 have to ask the Court to excuse my French, if I can refer to  
10 my client as CDC, I would appreciate that. I think it would  
11 be easy on all of us if we could do that.

12 THE COURT: We'll refer to your client as CDC.

13 MR. HELLMAN: Thank you, Judge.

14 Your Honor, before the Court is CDC's second  
15 motion for allowance of a late file claim. The Court may  
16 recall that the last time around that CDC had made the  
17 motion for permission to file a late claim and the Court had  
18 denied that motion without prejudice subject to our coming  
19 back with answers to certain questions and we took that  
20 directive very seriously, Judge.

21 THE COURT: Well, let's talk a little bit about  
22 that because I don't think all the questions have been  
23 answered and I'd like to start out with just some  
24 explanation as to why it took so long to deliver so little.

25 MR. HELLMAN: Well, Judge, we went back to the

1 client, which is a French-speaking client and explained to  
2 them the reasons for the Court's denial of the motion the  
3 first time around.

4 THE COURT: Just so we're around on representing a  
5 French-speaking client --

6 MR. HELLMAN: Yes, Judge?

7 THE COURT: -- I expect I'm not the only person in  
8 the room who's been to Paris and I expect that I'm not the  
9 only person in the room to know that certainly in the  
10 commercial world English is the lingua Franca of Europe.  
11 Everybody who's involved in business in Europe speaks  
12 English to one-on-one another. It's esperanto for business  
13 in Europe, so the argument -- I'm just letting you know  
14 right now that we're dealing with a French-speaking  
15 client -- isn't going to take you very far.

16 MR. HELLMAN: I understand, Judge, and I'm not  
17 making that as -- I'm not suggesting that as any type of  
18 excuse. I'm simply putting it out there to explain that to  
19 the Court.

20 Yeah, at the higher levels I think there is some  
21 English -- there are some English-speaking individuals --

22 THE COURT: There are plenty of people in this  
23 organization of 76,000 people who speak fluent business  
24 English and who understand that mail needs to be opened and  
25 read.

1 MR. HELLMAN: Well, here's the situation, Judge.  
2 We went back and we asked the client -- actually told the  
3 client that we're not coming back here unless we get as much  
4 information as we possibly could from them in order to  
5 answer the Court's questions, and yes, admittedly, there,  
6 are some blanks, but we did the best we could to fill them  
7 in.

8 THE COURT: Who is the individual who is  
9 responsible for this transaction and why is that individual  
10 not here or why is that individual not submitted to a  
11 deposition and why is it that your papers, after such a long  
12 period of time, provide absolutely no incremental  
13 information that goes to the question of excusable neglect?

14 MR. HELLMAN: Well, because there's not one  
15 particular individual involved in the transaction. As the  
16 Court can see from the papers, there are three or four  
17 different divisions that were involved in these -- in the  
18 master agreement transactions, okay.

19 To the extent that the mail was returned, which is  
20 what took us so long to find out, you know, who was  
21 responsible to sending that back, it turns out that it's  
22 nobody, Judge. Really, they have this central mail  
23 division, if you will, where everything goes to that  
24 division and the mail is sorted there by folks who don't  
25 necessarily speak English. Maybe they do speak a little bit

1 of English but maybe they don't speak English.

2 THE COURT: It almost doesn't matter.

3 MR. HELLMAN: But we couldn't find the individual  
4 responsible for that.

5 THE COURT: But it almost doesn't matter because  
6 regardless of the language that is spoken in the mailroom,  
7 presumably, there are procedures that are regularly followed  
8 by the personnel of the mailroom for dealing with mail such  
9 as this and for mail that is designated as important or even  
10 if the person who received the mail isn't sure that it's  
11 important, the procedure of just sending it back is just  
12 inexcusable to me.

13 And since your principle argument made a year and  
14 a half ago was that this is a vast organization that gets  
15 thousands of pieces of mail a week and that it's incredibly  
16 important to track mail that it be specially addressed, I  
17 have to think that lots of mail comes that isn't specially  
18 addressed, so one of the questions that hasn't been answered  
19 but was asked last time is what procedures apply to the  
20 processing of mail so that mistakes such as this don't occur  
21 on a routine basis and you haven't provided any of that  
22 information.

23 MR. HELLMAN: The answer to that question, Judge,  
24 is I think that why it highlights why it's so important that  
25 the debtor should have addressed that envelope to that

1 department because what happens, Judge, is --

2 THE COURT: Wrong answer to the wrong question,  
3 and I understand that you're being an advocate here.

4 I've asked specific questions that haven't been  
5 answered, so it's unreasonable to the point of being fool-  
6 hearty for any large organization, especially one entrusted  
7 with pension funds, to assume that it can rely upon third  
8 parties to correct deficiencies in its own organization.  
9 There needs to be procedures in the organization that are  
10 effectively idiot-proof, that allow for mail, regardless of  
11 how it's addressed, to get to the right place within the  
12 organization or there will be something akin to malpractice,  
13 and that's what this is.

14 MR. HELLMAN: Well, unfortunately, Judge, and it's  
15 part of getting to your answer to the question, what I was  
16 saying is that it's so important to that have particular  
17 address, and that's why the master agreement had that  
18 particular address.

19 THE COURT: But the master agreement, with  
20 respect, does not trump bankruptcy notes provisions, nor  
21 should it ever --

22 MR. HELLMAN: You see, that's where I --

23 THE COURT: You can disagree with me on this but  
24 you're going to lose on this. I take an emphatic position.  
25 You can't take notice provisions in an instant agreement and

1 make them govern a bar date order. The bar date order  
2 speaks for itself, needs to be complied with and it also  
3 appears to me that your client having terminated this  
4 transaction took ownership of the breakage from that point  
5 forward. They could not do nothing. They can't rely upon  
6 the fact that they didn't get actual notice when actual  
7 notice was mailed to three addresses and you haven't  
8 provided to me with any explanation as to how your client  
9 actually functions, other than to say lots of addresses, ten  
10 different addresses in Paris, 76,000 employees, very  
11 important that mail be specially addressed, but there has  
12 been no acknowledgment of responsibility and accountability  
13 for the problem.

14 Had there been more of that in the second motion,  
15 it would have been different from the first, but actually  
16 it's just late and saying the same thing again.

17 MR. HELLMAN: Well, actually, Judge, to the extent  
18 that the mail is not properly addressed and they can't  
19 figure out which department it goes to, unfortunately, it  
20 gets returned as undeliverable. That is why --

21 THE COURT: Unopened and returned?

22 MR. HELLMAN: Unopened and returned.

23 THE COURT: Don't you think that's a pretty stupid  
24 set of procedures for an organization that's entrusted with  
25 fiduciary responsibilities for retirees in France? Don't



1 you think that it amounts to something that's almost  
2 actionable negligence per se?

3 MR. HELLMAN: No, that's why they have in these  
4 documents, such as the master agreement, the very specific  
5 notice provisions.

6 THE COURT: Very specific notice provisions do not  
7 trump an obligation on the part of a swap counterpart party  
8 to act commercially reasonable ways and the from moment that  
9 your client terminated the swap on September 18th, I  
10 believe, 2008, it took ownership of the termination.  
11 Somebody in authority messed up. Somebody in authority made  
12 a business decision to write letters in English to Lehman to  
13 terminate the swap and then relies upon the fact that they  
14 aren't English speakers to say, well, a document that comes  
15 to us in our mailroom that isn't properly addressed and that  
16 we return does not constitute due process under the  
17 constitution, hardly.

18 Under our procedures, properly mailed notices that  
19 actually are delivered constitute actual notice and I  
20 completely disagree with your argument and I find that your  
21 papers a year and a half late offer me absolutely nothing to  
22 distinguish them from the first set. You had denial without  
23 prejudice and then came back with more of the same.

24 MR. HELLMAN: Judge, if I may, there are a few  
25 cases that were cited in our papers, National Union Fire

1 Insurance Company, I believe.

2 THE COURT: The debtor distinguishes those cases.

3 MR. HELLMAN: That says if you contract for a  
4 particular type of notice, then that trumps whatever notice  
5 you get, whether it be by notification by publication or  
6 notice to a different address or anything else.

7 So, I understand where the Court is coming from in  
8 terms of the position that the Bankruptcy Code trumps  
9 anything that the parties can agree to, but I think that  
10 those cases speak to a different -- or to a whole  
11 differently.

12 THE COURT: Let's oh before we get to the cases, I  
13 need to understand a couple of things.

14 MR. HELLMAN: Sure.

15 THE COURT: One, why did it take as long as it did  
16 to remit this motion because the delay almost seems  
17 inexcusable to me and I'd like an explanation --

18 MR. HELLMAN: Sure.

19 THE COURT: -- other than you have a French-  
20 speaking client, and two, why weren't you able to provide  
21 more information to answer the questions that were quite  
22 plainly on the record last time?

23 MR. HELLMAN: Well, to answer the first question,  
24 Judge, again, we took Your Honor's -- I don't want to say  
25 directive -- but inquiry very seriously and we spent

1 considerable time and effort trying to find the answer to  
2 the question of who sent that back and, you know, months  
3 later after investigating, we found that, well, we couldn't  
4 find the individual who sent it back. It was somebody from  
5 this central mail division, and, you know, we tried to  
6 inquire about, well, how does that work and what happens.

7           Their answer is well, we get thousands of pieces  
8 of mail a day that we specifically require people to address  
9 mail to a particular location because we have so many of  
10 them and if it's not, unfortunately, it doesn't get opened  
11 and it gets sent back, return to sender, and that seems to  
12 be what happened in this case.

13           And as we're preparing the papers and drafting the  
14 papers, we have more and more questions about what's going  
15 on, but even before that, Judge, there's still other issues  
16 concerning folks from the CDC who had left that we were  
17 dealing with, the personnel. So new personnel came in.  
18 It's a quasi-governmental agency where, yes, it's not the  
19 most efficient entity in the world, but we had to deal with  
20 those folks and catch them up to speed. We had to get  
21 authority to file a second motion, so it did take some time.  
22 We had to get retained for a second time with respect to the  
23 second motion, so it did take some time, no question.

24           But, you know, I was here listening to some of the  
25 arguments and we're not trying to get first in line like

1 some of the others, but the Court had given the debtors  
2 until, I think, September, maybe, but certainly 2015, some  
3 point in 2015.

4 THE COURT: September, 2015.

5 MR. HELLMAN: Okay. So, yes, there may have been  
6 a delay in terms of being able to file this second motion,  
7 and maybe even the first motion because they really didn't  
8 know what to do at that juncture, but it doesn't have any  
9 effect on the debtors. We're talking about a very small --  
10 yes, three or four million dollars is a lot of money -- but  
11 we're talking about a very small sum of money given the  
12 context of this monstrosity of a case where there's millions  
13 if not billions of dollars involved in claims. There's  
14 really no downside to the debtors to allow this claim to  
15 save three or four million dollars of money for civil  
16 servants in France, you know, their pension funds.

17 So, yes, there was delay. I think from CDC's  
18 side, there's no question, and I can't deny that, but I  
19 think in the context of the overall case, there's really no  
20 prejudice to the debtors on this.

21 THE COURT: Well, that's a different argument,  
22 though. What I'm struggling with in my two-part question is  
23 the reason for the delay and I think the short answer is it  
24 took too long, didn't it, but nobody's prejudiced in your  
25 argument.

1 But the second part of the question is what's  
2 different in this motion from the first one? What questions  
3 have been answered about whose responsibility it was? Who  
4 takes ownership of this trade, including the decision to  
5 terminate it? Who, if anybody, paid attention to it after  
6 it was terminated? Who, if anybody, paid any attention to  
7 the fact that Lehman Brothers was in bankruptcy after it was  
8 terminated? Who, if anybody, supervised the mailroom, and  
9 takes ownership for the procedures that are followed there?  
10 What if anything can be said about excusable neglect in  
11 setting that appears to be supine negligence?

12 MR. HELLMAN: Well, I don't know if there's any  
13 singular individual. I mean I've seen some of the documents  
14 that have been submitted by the debtors, but there a few  
15 folks who sent letters saying, you know, we're terminating  
16 this master agreement, which, by the way, Judge, you know, I  
17 know that the Court had said that once it's terminated,  
18 somebody has to seek responsibility for that, but the notice  
19 provisions still survived the termination of the agreement,  
20 so I just wanted to make that clear.

21 THE COURT: As to the notice provision issue, just  
22 so it's clear, if you think about what you're advocating and  
23 you take it to its logical extreme in a case such as this  
24 that involves significant complexity in the documentation,  
25 notice provisions that are buried inside agreements are

1 probably much more important for the non-defaulting party to  
2 give notice to the defaulting party than it is for the  
3 defaulting party to give notice to the non-defaulting party  
4 because in the world of derivatives and swaps, parties that  
5 have in the money claims are expected commercially to take  
6 appropriate steps to protect their interests and your client  
7 did nothing.

8 And your second motion offers for evidence on  
9 diligence on the part of your client to pay any attention to  
10 this. It appears to have completely slipped off the radar  
11 screen of your client. Now, you try to argue that they  
12 didn't need to do that because Lehman had an obligation in  
13 giving notice of the proof of claim bar date to follow  
14 special notice provisions in the ISDA, but they followed  
15 notice provisions adequately for purposes of the proof of  
16 claim notice provisions themselves.

17 To apply your rule in a case such as this would  
18 mean that the debtor would need to examine every single  
19 operative document that might include a special notice  
20 provision in the context of sending out bar date notices to  
21 the world.

22 MR. HELLMAN: And to some degree, Judge, I think  
23 they did that because CDC did get all the correspondence  
24 from the debtors.

25 THE COURT: As a result, you acknowledge that

1 there was notice sufficient for due process under applicable  
2 U.S. law.

3 MR. HELLMAN: I don't think so, Judge. I think  
4 for a note -- let's agree on a couple things. CDC was a  
5 known creditor. They were listed on the schedules, so  
6 publication is not going to save the day for the debtor.  
7 The only issue I think they can raise with respect to notice  
8 is number one, they had served CDC Capital, which by the  
9 name they served that notice, it was no longer affiliated  
10 with CDC and the notice requirements in the contract said,  
11 with respect to CDC Capital, only with respect to disputes  
12 or transactions involving CDC Capital would notice be  
13 sufficient to them and that didn't constitute notice to CDC  
14 proper and they sent it to some other address in Paris which  
15 was not part of this operative agreement which had specific  
16 notice provisions.

17 But the debtor knew that there were specific  
18 notice provisions because they sent notices and other  
19 letters and correspondence to CDC using the very specific  
20 required notice provisions in the ISDA agreement.

21 THE COURT: That's not the point. The point is as  
22 to this particular notice, it was correctly addressed and it  
23 went to the central mailroom and it was then kicked back,  
24 return to sender. Does that pattern establish actual notice  
25 of the bar date as a matter of law?

1 And the answer is yes. Tell me why I'm wrong --

2 MR. HELLMAN: Well --

3 THE COURT: -- because the answer is yes.

4 Consistent with my view, and you can convince me I'm wrong  
5 now, this is your opportunity -- ISDA special notice  
6 provisions do not trump general notice provisions. General  
7 notice provisions were calculated to provide actual notice  
8 to your client and everybody else that received notice of  
9 the bar date. In this instance, a properly addressed letter  
10 was delivered, by your own admission to the central mailroom  
11 and the central mailroom then acted negligently.

12 MR. HELLMAN: Well, that's where I think we  
13 disagree, Judge. I think the central mailroom acted in  
14 accordance with whatever procedures the central mailroom  
15 has.

16 THE COURT: Those procedures are exactly what I  
17 wanted to know more about --

18 MR. HELLMAN: Which is --

19 THE COURT: Let me just finish.

20 MR. HELLMAN: Sure.

21 THE COURT: Between the last hearing and this  
22 hearing, now a year and a half later. Those procedures seem  
23 to me inexcusable. Inexcusable because it is set up to  
24 almost ensure the properly addressed mail doesn't get  
25 delivered just because it doesn't include some special kind



1 of notice. There should be some kind of system to direct  
2 mail to proper locations within the organization and you've  
3 offered me nothing. You've offered me nothing to indicate  
4 what, if any, procedures exist, other than that they don't  
5 exist.

6 MR. HELLMAN: Without the tension line, without  
7 the specific direction as to where the mail should go,  
8 there's no way for them to tell where it's supposed to go.

9 THE COURT: That's absolutely untrue. We live in  
10 a world of Google. We live in a world in which documents  
11 are routinely scanned into systems and with encryption  
12 software, people are able to write to almost every  
13 organization on the planet with not necessarily directions  
14 to send it to a particular office and for a little bit of  
15 investment, a big organization is able to deal with mail.  
16 If you were to write to the White House, Washington, D.C.,  
17 with a letter of some complaint about what's going on in  
18 Washington right now, more likely than not that letter won't  
19 get to President Barrack Obama, but it will get to somebody  
20 who's responsible for dealing with it.

21 What is maddening to me -- and that's what makes  
22 your argument so difficult -- is that nobody opened the  
23 letter. Nobody opened the letter, thought about its  
24 contents, gave any consideration to what it said and  
25 attended to it. It's a sign of complete and utter

1 negligence. And it doesn't matter whether it's France,  
2 Germany, the United States or some other country on the  
3 planet, especially a large organization that presumes to act  
4 on behalf of third parties in a fiduciary capacity has an  
5 obligation to conduct itself at a higher level. This, to  
6 me, indicates complete and utter lack of attention to  
7 detail.

8 MR. HELLMAN: And so, how, then, Judge, do we set  
9 apart the National Union cases where this very situation  
10 occurred where mail was sent to a large organization -- a  
11 private organization, I might add, so it's probably a little  
12 bit easier for them to have some type of internal control --  
13 and it's not addressed to -- but it's a specific attention  
14 line, and the Court in those cases said it doesn't  
15 constitute actual notice because it has to go to that  
16 specific address, to that specific attention line and it  
17 didn't.

18 And in those cases, the Court said the notice was  
19 not quote, unquote, actual notices for purposes of the bar  
20 date. We're talking about a very similar, if not the same  
21 exact situation here, and I understand the Court's criticism  
22 of CDC. Perhaps there's something that CDC could do, should  
23 have done, I'm not sure, Judge. They have a massive quasi-  
24 governmental agency where, you know, they have whatever  
25 implementation or policies they have with respect to mail,

1 again, which is why they have these specific, very specific  
2 addresses in all of their agreements, and if they don't have  
3 that specific address in that specific agreement, it's going  
4 to be in some sort of central, lost in the sauce, mailroom,  
5 if you will, and they're going to say, where do we send it?  
6 We don't really know. It doesn't have the attention line,  
7 it's going to get returned to sender and then maybe sender  
8 will then say I'm going to send it back.

9 I'm going to say, you know, why'd this come back  
10 to me? And I think there's no effort on epic's part or  
11 debtor's part to say why'd this come back, let's see if we  
12 have a correct address. Let's see -- you know, we know  
13 we're sending mail to this address attention this back  
14 office, but we didn't do it on this envelope, so let's  
15 resend it, but that didn't happen either.

16 I understand that there's issues on each side of  
17 the case, but the case law, per National Union, says, well,  
18 if you contract for a specific notice at a specific location  
19 using a specific attention line, that you're entitled to get  
20 notice at that specific address with that specific attention  
21 line, and if you don't, it's not actual notice and that's  
22 really where we come out, Judge. And to the extent that  
23 there's a known creditor, publication is not going to help  
24 and to the extent that they're going to send it to other  
25 places where these entities aren't involved in the

1 transaction and there's a specific days agreement that  
2 controlled substance where notices are supposed to go, that  
3 doesn't constitute actual notice and that's really where we  
4 come out, Judge.

5 THE COURT: That's pretty much the same argument  
6 that was made the last time, though, and I still don't  
7 understand why you haven't been able to supplement with more  
8 information about your client's diligence and attention to  
9 this particular transaction because to the extent that we're  
10 going to the question of excusable neglect -- and let's just  
11 say that's where we're going, let's say for the sake of a  
12 hypothetical --

13 MR. HELLMAN: Sure.

14 THE COURT: -- that the document in question, the  
15 notice of the bar date was addressed exactly in accordance  
16 with the ISDA agreement, was delivered to the mailroom and  
17 one of two things happened. Either the mailroom mistakenly  
18 sentenced it to the wrong department where it is buried in a  
19 stack of papers and nobody attends to it or it is sent to  
20 the right department and somebody gets the document and then  
21 forgets to deal with it, just forgets it or there's some  
22 personal emergency and that person leaves the office for six  
23 months and misses the bar date. In that instance, no issue  
24 of notice, it's an issue of excusable neglect.

25 Here, what's your excusable neglect argument?

1 MR. HELLMAN: Well, I think it's different than  
2 the hypotheticals than Your Honor has posed.

3 THE COURT: But you're talking to me about a  
4 three-million dollar claim --

5 MR. HELLMAN: Yes, Judge.

6 THE COURT: -- almost five and a half years into  
7 the Lehman case. It's almost December. We're two years --  
8 we're about two years after the confirmation of the plan and  
9 more than five years after the commencement of the case and  
10 everybody in the world knows that Lehman went into  
11 bankruptcy. I don't think that there's a person alive in  
12 any civilized jurisdiction who doesn't know that fact.

13 MR. HELLMAN: That's probably true.

14 THE COURT: And so all kinds of people all over  
15 this organization in France, speaking French, admittedly,  
16 some speaking English, I'm sure.

17 MR. HELLMAN: Yes, that's how they're  
18 communicating with us at the higher level, yes.

19 THE COURT: And so they know that there's a  
20 bankruptcy and they know that they've terminated a swap  
21 agreement. I don't understand and it's one of the things  
22 that I was asking for last time, who was responsible for  
23 this?

24 MR. HELLMAN: And again, I don't think it's any  
25 one particular individual in terms of who's responsible.

1 THE COURT: It could be a group responsible for  
2 it. For example, I had an accident, it was insured, and I  
3 had a claim number and every time I called the insurance  
4 company somebody else picked up the file just by coding in  
5 the claim.

6 So can be a group that's responsible for the  
7 management of certain matters; it doesn't have to be one  
8 person. Presumably, they're people that are all part of  
9 some organized group that has managements and procedures and  
10 tickler lists and follow-ups and things that people in  
11 offices are familiar with to avoid malpractice and it seems  
12 to me that this is a situation of gross negligence.

13 MR. HELLMAN: Well, as much as we dug to try and  
14 find out that answer for the Court, there was no real answer  
15 to that specific individual who's responsible for the ISDA  
16 agreement.

17 THE COURT: So let's just say for the sake of  
18 discussion that a properly addressed letters gets delivered  
19 to the department that is referenced in the special address  
20 line of the ISDA agreement. I presume there are a suite of  
21 offices and that there's a door or there's a cubicle or a  
22 set of cubicles and that there are people who work in a  
23 particular department of the organization responsible for  
24 managing derivative trades and derivative transactions; is  
25 there such a department?

1 MR. HELLMAN: I don't know if there's such a  
2 department, but there are -- set forth in the papers, there  
3 is the legal department, the financial department, and the  
4 mailroom that deals with these -- well, the mailroom is its  
5 own separate, you know, large-scale mailings.

6 THE COURT: I'm not talking about the mailroom,  
7 right now. I'm talking about the people who are charged  
8 with the responsibility to monitor performance under  
9 derivative transactions.

10 MR. HELLMAN: I'm sure there are -- there are  
11 departments, and I know that, again, counsel, for the  
12 debtors has included in one of its submissions, the letters  
13 written by the people who decided, you know what, there's a  
14 bankruptcy, you're in default under the ISDA agreement,  
15 we're, you know, we're calling default.

16 Yes, from there, Judge, in terms of who monitors  
17 and who follows and what happens, do they go to the mailroom  
18 where there's a thousand pieces of mail being delivered and  
19 say, did I get notice of the bar date or did I get some  
20 notice from Lehman? You know, I'm sure it doesn't happen  
21 that way.

22 THE COURT: No, I'm not asking --

23 MR. HELLMAN: Is anybody responsible for following  
24 the bankruptcy?

25 THE COURT: I'm not actually asking that question.

1           The question I'm asking has nothing to do with  
2 supervision of the mailroom by either the legal department  
3 or people who work in the finance department.

4           MR. HELLMAN: Right.

5           THE COURT: But rather people who work in the  
6 legal department and the finance department who have it  
7 within their assigned responsibility making sure that these  
8 transactions are properly handled and presumably, although  
9 nobody has told me this, at the time that Lehman went into  
10 bankruptcy, certain people who speak English and who  
11 understand derivative transactions wrote the letters that  
12 have been cited to me by the debtor and they were cited to  
13 me because they are written in English and they are written  
14 in good English, apparently by someone familiar with the  
15 protocol for terminating transactions of this sort.

16           So someone made the business decision to  
17 terminate. What happened next? Who, if anybody, took  
18 responsibility for the resulting claim? Who, if anybody,  
19 monitored the Lehman bankruptcy? Who, if anybody, engaged  
20 counsel or chose not to engage counsel to deal with this  
21 issue? In other words, the question on the floor has less  
22 to do with mail and more to do be management or  
23 mismanagement, as the case may be.

24           MR. HELLMAN: And I don't know that we were able  
25 to locate any particular voyage who said they were



1 particularly responsible for following up in the context of  
2 the bankruptcy case, and I understand the Court's inquiry,  
3 and I don't mean to make light of it, but in a Chapter 11  
4 situation, they, under the prevailing law don't necessarily  
5 have to, right? They don't have to say, well, where's my  
6 bar date notice? Or pick up the phone and say, what's going  
7 on with the bankruptcy? In a Chapter 11 it's presumed that  
8 the debtor has the obligation to provide whatever the  
9 applicable notice is.

10 And I understand the Court's view on the issue.

11 THE COURT: Well, what I'm searching for, as I did  
12 about a year and a half ago, is something that shows more  
13 than has already been shown that goes to the question of  
14 performance and excuse and to simply say that we didn't know  
15 takes you only so far when a properly addressed letter was  
16 delivered and then not properly processed.

17 MR. HELLMAN: Well, and I guess the question  
18 comes, what's properly addressed? Yes, it was addressed to  
19 the location.

20 THE COURT: It was received.

21 MR. HELLMAN: It was received, but it sufficiently  
22 addressed such that it would have made its way to the proper  
23 location.

24 THE COURT: It would have -- it would have  
25 presumably, if the mailroom opened the letter instead of

1 stamping it return to sender and then hand delivered the  
2 contents to a supervisor or some employee that had the  
3 capacity to direct the letter within the organization to a  
4 place that would deal with so much things, like a help desk,  
5 the kinds of things that people who deal with large  
6 organizations expect all the time, just mature user-friendly  
7 behavior in a commercial world that's largely linked.

8 And you've said nothing to indicate that the  
9 mailroom did anything other than act mechanically and  
10 without thought.

11 MR. HELLMAN: And I don't mean to degrade those  
12 who are working in the mailroom, but I don't know that they  
13 have any authority to do anything other than try to find the  
14 correct location, and if they can't without opening the  
15 mail, because that's not their charge, they have to send it  
16 back, return to sender, and I would have hoped, also, that  
17 the debtor would have said, gee, you didn't get notice of my  
18 bar date at this address and double-check it and see that  
19 they've sent this mail to a particular -- to that address,  
20 but to a particular attention line and send it back. Make  
21 another effort.

22 THE COURT: Why don't we hear what Mr. Horwitz has  
23 to say about this situation and then if you have more, we  
24 can come back.

25 MR. HELLMAN: Thank you, Judge.

1 MR. HORWITZ: Good morning, Your Honor.

2 Maurice Horwitz from Weil Gotshal & Manges.

3 THE COURT: It's the afternoon.

4 MR. HORWITZ: I'm sorry, afternoon.

5 It's all a blur to me at this point, Your Honor.

6 THE COURT: Right.

7 MR. HORWITZ: On behalf of the plan administrator,  
8 Your Honor, I have prepared remarks for this hearing but the  
9 Court has really already pointed out most of what I was  
10 going to say. This Court already denied the motion that was  
11 filed, now it's almost four years ago and there isn't very  
12 much in the second motion that has added to that first  
13 motion. So while I could point out that the debtor's notice  
14 of the bar date was sufficient, as this Court has pointed  
15 out, it was sufficient on due process grounds. It was  
16 sufficient under the bankruptcy rules, most importantly, it  
17 was perfectly in accordance with the bar date order. The  
18 purpose of which was, in part, to establish some -- with  
19 some certainty what proper notice of the bar date would be.

20 CDC had its address listed on the debtor's  
21 schedules and the debtors served notice of the bar date on  
22 that address. There is nothing about the master agreement  
23 that trumps this Court's -- the bar date order in this case.

24 THE COURT: What's your position on the National  
25 Union case that has been cited by CDC?

1 MR. HORWITZ: Well, that is the big -- that is the  
2 main distinguishing factor between this case and the  
3 National Union cases. There wasn't, in those cases, an  
4 order already determining and establishing what proper  
5 notice is. There is that order here. That order was  
6 entered well before or well after the CDC had terminated its  
7 contract with LBSF. CDC had always had the opportunity to  
8 correct the debtors' schedules. It was actually CDC's  
9 responsibility to do so. It did not do so.

10 In addition, Your Honor, those cases deal with  
11 providing notice of the commencement of an individual's  
12 Chapter 7 case to National Union. There's no way that this  
13 subsidiary of AIG would ever have known that one  
14 individual's Chapter 7 had been commenced and that is really  
15 another reason why it was appropriate for National Union to  
16 an another opportunity to point out in those cases that a  
17 certain debt was not dischargeable.

18 Here, it is established that CDC knew about the  
19 bankruptcy and reacted to the bankruptcy by terminating its  
20 contract with LBSF. The National Union cases are completely  
21 absent in this situation.

22 I don't have anything further to add unless the  
23 Court has any questions?

24 THE COURT: I don't.

25 Anything more?

1 MR. HELLMAN: No, Your Honor.

2 THE COURT: Nothing's really changed between the  
3 first motion by CDC for an order permitting a late-filed  
4 proof of claim and this second motion and for the very same  
5 reasons articulated on the record last time, the Court finds  
6 that no cause has been shown to permit a late-filed claim.

7 CDC is a large and sophisticated organization  
8 described by counsel as a quasi-governmental enterprise that  
9 is purportedly is responsible for the administration of the  
10 pension funds of French civil servants. The letter that  
11 were exchanged shortly after the commencement of the  
12 bankruptcy case in September of 2008 demonstrate a level of  
13 sophistication on the part of CDC comparable to that of  
14 other counterparties to derivative transactions, many of  
15 whom exercised the right to seek early termination of these  
16 transactions in September. The correspondence demonstrates  
17 that someone in authority had to have been thinking about  
18 this transaction at the time of termination and was aware of  
19 the Lehman bankruptcy, not only aware of it, but taking  
20 action in response to it.

21 The letter containing the notice of bar date  
22 admittedly was received by CDC at an address contained  
23 within the ISDA agreement. The only thing missing being the  
24 special address provision that according to CDC would have  
25 enabled the mailroom to deliver the proof of claim to the

1 department or departments within CDC responsible for this  
2 transaction.

3 Nonetheless, in both the first motion and the  
4 second motion, no evidence has been presented as to the  
5 individuals who work within this department, their  
6 responsibilities within CDC, where they sit, whether in the  
7 finance group or in the legal department, whether they are  
8 still employed by CDC and what, if any, diligence or action  
9 was taken by any of these individuals in recognition of the  
10 Lehman bankruptcy claims.

11 The fact that this letter containing the notice of  
12 bar date was in fact delivered to the mailroom and then  
13 mishandled there represents adequate notice of the bar date  
14 consistent with the bar date order. Nothing has been  
15 presented in the second motion to explain why CDC did  
16 nothing to protect its interests after terminating this  
17 derivative transaction. That lack of evidence makes it easy  
18 for the Court to deny the second motion this time with  
19 prejudice.

20 We're adjourned.

21 (Whereupon these proceedings were concluded at  
22 2:49 p.m.)

23

24

25

I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sherri L. Breach, CERT\*D-397, certified that the  
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Sherri Breach

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